In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 685

PETE MAHONEY,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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INDEX

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES AND CONSTITUTIONAL PROVISIONS

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PETE MAHONEY,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Pete Mahoney, by his attorney, William G. Fitzpatrick, respectfully prays for the issuance of a Writ of Certiorari to review a final judgment of the Michigan Supreme Court, affirming petitioner's conviction (on December 8th, 1945) and his sentence thereupon (on July 8th, 1946) in the Circuit Court for the County of Oakland, State of Michigan.

(Unless otherwise clearly shown by context, numbers in parentheses preceded by "R" refer to pages of the printed record.)

SUMMARY STATEMENT OF THE CASE

Petitioner, together with Harry Fleisher, Mike Selik, Sammy Chivas, and William Davidson, was charged in an information filed August 30, 1945 (R. 1194) with armed robbery of one James Dades[1] at the Aristocrat Club in the City of Pontiac, County of Oakland, Michigan, on December 2, 1944, between three and four a. m.

This prosecution grew out of a complaint and warrant issued June 11, 1945, by a so-called "one man grand jury" sitting in Oakland County, Michigan. After an examination held July 21 and 22, 1945, petitioner and all co-defendants were bound over for trial.

On October 20, 1945, petitioner filed a motion for continuance (R. 4, 1023-1026), and for separate trial (R. 4, 1027-1030). Both motions were denied (R. 4, 29, 30).

The trial of the case commenced October 23, 1945 (R. 5, 109). On December 7, 1945, petitioner and all co-defendants were found guilty as charged by verdict of the jury (R. 55) and on December 8, petitioner was sentenced to prison for a term from 25 to 50 years (R. 57). Petitioner seasonably filed a motion for a new trial (R. 1067) which was denied (R. 1088).

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[1] James Dades was the proprietor of the Aristocrat Club, which was patronized principally by members of Greek extraction. The club rooms were utilized for gambling purposes. Dades and Petitioner Mahoney were old friends (R. 159), both were of Greek ancestry. Petitioner's full and correct name is Peter Apostolopoulos. He has not used his correct name for more than ten years because pronunciation thereof was so difficult (R. 534).

THE FACTS[2]

The case against petitioner stands or falls upon the testimony of two state's witnesses, Abramowitz and Luks. Both of these men, having been granted immunity against prosecution for the robbery (R. 450, 206), freely admitted it.

Abramowitz was 37 years of age. In 1925 he was convicted of a felony at Detroit, Michigan (automobile theft) and sentenced to two years probation (R. 346). In 1928 he was convicted of a second felony at Detroit (breaking and entering) and sentenced to prison for a term of five to fifteen years (R. 346). He was convicted of a third felony in 1936 (robbery armed) and sent to prison for ten to twenty years (R. 346). He was on parole at the time of the Pontiac robbery. Abramowitz had also confessed to participation in a 1945 conspiracy to murder (R. 233). He had received immunity on this charge.

State witness Luks was 29 years old, and also had been convicted of three felonies. The first was in 1933 (larceny from a building) and he was sentenced to two years probation, upon violation whereof he was sent to prison for one to four years (R. 167). The second felony conviction was in 1937 (larceny) upon which he was sentenced to prison for two-and-a-half to five years (R. 168). His third felony conviction (carrying a concealed weapon)

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[2] Recognizing the restricted scope of this Court's supervision (under the Fourteenth Amendment) of the State's judicial process and that the rules require that petition for writ of certiorari be concise, nevertheless, we submit that it is necessary to summarize for the Court all significant testimony in order that we may properly assist this Court in reviewing the record, a task which must be borne by the Court where, as here, there is claim of denial of due process. (Cf. *Avery v. Alabama*, 308 U. S. 444, 447).

was in 1940, and he was sentenced to prison for from five to ten years. He was on parole at the time of the Pontiac robbery. He likewise admitted complicity in a conspiracy to murder in 1945, and had been granted immunity on this charge (R. 207). He was familiar with the Michigan Habitual Criminal Law, and knew that the penalty thereunder for a fourth felony conviction was life imprisonment (R. 225).

STATE'S THEORY OF THE CASE

It was the theory of the State that petitioner and co-defendants Fleisher and Selik solicited and obtained the consent of State's witnesses Luks and Abramowitz and co-defendant Davidson to actually perpetrate the robbery, and that of defendant Chivas to obtain admission into the club to be robbed for the robbers (R. 347, 349-359); that in pursuance whereof all the defendants met with Luks and Abramowitz at petitioner's coffee house in downtown Detroit about 1:00 a. m., December 2, 1944 (R. 354) where they discussed the projected robbery and agreed that the fruits of same would be divided between Luks, Abramowitz, Davidson and Chivas, and that Fleisher, Selik and Mahoney would receive nothing (R. 174). Just what Fleisher, Selik and Mahoney were to gain from the robbery is not apparent from the record, but it probably can be inferred that the prosecution's claim is that these three expected that, as a result of the robbery, Dades would be without funds and thereby they would be enabled to take over his gambling establishment (R. 351). Luks testified he met Mahoney only once (R. 168); that he came to Detroit December 1, 1944, after talking to Selik by long-distance telephone (R. 189); that during this conversation he made no agreement to meet Selik at

any certain place (R. 189) and that Mahoney's name was not mentioned (R. 194) and that, whereas, on previous occasions he had met Selik only at a certain saloon in the city of Detroit, nevertheless, he went to Mahoney's coffee house on the night in question only "because it was closer to the railroad station" (R. 189-190, 226).

It is admitted that in October, 1944, all of the defendants, excepting Davidson, visited Dades at Pontiac to obtain funds to aid in the prosecution of an appeal for Fleisher's brother Louis, who had been convicted of a crime in another state (R. 153-155, 714). Even though Dades was short of funds (he had been ill for some time and had suffered gambling losses), he offered to contribute $500.00 cash and a valuable diamond ring. His offer was refused (R. 563-566). Dades and the defendants named parted the best of friends (R. 155) and from that day henceforth, Dades testified that he heard nothing from any of the defendants, and that after the robbery he operated his gambling establishment unmolested by any of the defendants (R. 159).[3]

It is the further claim of the State that after the meeting in petitioner's coffee house, all the defendants drove to a saloon in Detroit in petitioner's automobile where they obtained the use of an automobile owned by one Martin Eisner (R. 358).

State's witness Eisner testified that on December 1, 1944, he loaned his automobile to one Hymen Niskar with the understanding that Niskar would return it to the vicinity of Eisner's residence the same evening (R. 320);

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[3] Dades testified that among friends of Greek origin, it was the custom whenever necessary for them to help each other financially (R. 160). He testified of having previously loaned $1,500.00 to Mahoney indirectly and that he was repaid by Mahoney (R. 160).

that the following morning, he found the car at the place where Niskar agreed to leave it, but that upon driving downtown, his attention was called to substantial blood-stains on the rear floor carpeting of his car (R. 322, 323); and that the amount of blood was such as to cause a lawyer riding in the automobile to inquire of Eisner, "Who had the miscarriage?" (R. 339); that Eisner went to Selik's apartment on the afternoon of December 2, 1944, and asked Niskar how the blood came to be upon the floor rugs of his car, but received no satisfactory explanation from Niskar (R. 326).

The State likewise claimed that the defendants Davidson, Selik, and Luks and Abramowitz, were driven to Pontiac in Eisner's car by Fleisher (R. 358); that Petitioner drove his car, an Oldsmobile, to Pontiac, and that defendant Chivas rode with him; that Mahoney took three revolvers with him in his car on this trip (R. 179); that both cars arrived in the vicinity of Dades' place at Pontiac within a few minutes of each other (R. 178); that Chivas went into Dade's establishment, came back to Eisner's car and informed the occupants thereof that only a few persons were in the establishment and that it did not look like a good haul (R. 178). The State claims that thereupon Chivas was sent back with the understanding that he was to admit the holdup men within four or five minutes (R. 179); that thereupon, Luks, Abramowitz and Davidson each obtained a pistol from Mahoney's car, went upstairs to Dades' establishment and were refused admittance (R. 180); later that upon reaching the doorway of the gambling establishment, Abramowitz smashed the glass door, reached in, unlatched the door, and gained admission for his associate Davidson (R. 362) who, together with Luks, robbed the patrons of the club; that in opening the door, Abramowitz severely cut his wrist

and arm, and it bled so profusely that he ran downstairs to Eisner's car, which the State claimed was then occupied by Fleisher and Selik, got in the back seat, remained only a few seconds and then went to Mahoney's car (R. 363); and Mahoney drove him to a hospital at Detroit, Michigan.[4]

The State further claims that after the robbery, Fleisher and Selik drove Davidson and Luks from Pontiac to Detroit, where Fleisher left the others; that Selik, Davidson and Luks went to a restaurant on Dexter Boulevard in Detroit, where from the proceeds of the robbery Luks gave Davidson $150.00 as his share (R. 185). The stories of Luks and Abramowitz were vague and conflicting as to the exact proceeds of the robbery. At one point it was claimed that $800.00 was taken, later, that $1,600.00 was taken (R. 184, 258, 281). Luks testified that after leaving the Dexter Boulevard restaurant, he and Selik went to Greenfield's Restaurant on Woodward Avenue in downtown Detroit, where they were joined by Chivas; that Selik phoned Mahoney and that shortly thereafter, Mahoney joined the party at Greenfield's (R. 184-185); that he gave the defendant Chivas $150.00 at Greenfield's Restaurant (R. 186).

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[4] Abramowitz testified that Mahoney's car was a *two-door Oldsmobile* (R. 401); that while bleeding freely, he rode some twenty-five miles to Detroit in Mahoney's car, and that during this ride the blood from his wounds ran over and upon the seats and floor of the car in which he was riding (R. 406). State Police Lieutenant Morse, who questioned Petitioner in April following his arrest, was advised by petitioner that he owned a *four-door* Oldsmobile sedan (R. 562). The State adduced no proof whatsoever that any test for blood had ever even been attempted on the upholstering or floor coverings of Mahoney's car after it was located.

DEFENSE THEORY OF THE CASE

Petitioner Mahoney, who has consistently, from the moment of his arrest, denied any knowledge of or participation in the Pontiac robbery, took the stand in his own behalf and testified fully and frankly, both on direct examination (R. 534-537, 550-572, 576, 577, 616) and upon cross-examination (R. 577-615). Co-defendants Fleisher and Selik likewise took the stand and respectively denied any knowledge of or particuation in the robbery at Pontiac (R. 712-717, 771-782).

Petitioner testified that he emigrated from Greece in 1921, and that he had been a professional gambler at the time of his arrest and for a number of years prior thereto (R. 534, 566, 588); that he had known co-defendant Fleisher very well for about three years (R. 555), co-defendants Selik and Chivas for many years (R. 555-556), Luks and Abramowitz for one year (R. 556, 557), and co-defendant Davidson since 1942 (R. 613); that he first heard about the Pontiac robbery about a week after his arrest on April 20, 1945 (R. 560); that as a favor to Selik, he went to Harper Hospital, Detroit, with Selik one morning in December 1944 about 6:00 a.m., where he and Selik took Abramowitz from the hospital, and that this was after he had received a phone call from Selik asking him to get a room for Abramowitz at his (petitioner's) hotel (R. 558); that upon leaving the hospital the three went to a restaurant, and that shortly thereafter petitioner returned to his hotel alone (R. 559, 560); that upon the night preceding the morning that he went to Harper Hospital, he has been at his place of business in downtown Detroit until about 2:00 a. m. (R. 560, 561), that he thereafter went to a nearby restaurant which he

left after 3:00 a. m. for his hotel, where he retired between 4:00 and 5:00 a. m. (R. 561); that he had not been in any saloon after he left his place of business and prior to the time when he took Abramowitz out of the hospital; that he owned a maroon-colored *four-door 1941 Oldsmobile Sedan* at the time of the trial, and prior to the time of the Pontiac robbery; that the upholstery and floor rugs in his car had never been changed at any time either prior or subsequent to the Pontiac robbery (R. 563); that he had been convicted as a gambler upon several occasions (R. 569), and in 1933, for possession of an unregistered gun in a gambling establishment he was then operating (R. 570).

Selik testified that on December 2, 1944, at about 6:00 a. m., while he was in bed at his home, he received a phone call from Luks, who told him that he needed help (R. 775); that thereupon Selik met Luks at Greenfield's Restaurant in Detroit, where Luks advised him that Abramowitz had been a victim of an attempted robbery, and that while resisting his assailants, Abramowitz had been cut, and that Abramowitz wanted a room in a hotel, where he could stay after he left the hospital; that thereupon Selik phoned Mahoney whom he knew to be a permanent resident of the Strathmore Hotel, and requested Petitioner to get a room there for Abramowitz, and that upon Mahoney asking why, Selik asked Mahoney to join him immediately at Greenfield's Restaurant, where he would inform him of the entire transaction (R. 775-777); that Mahoney, pursuant to Selik's request, secured a room at the Strathmore Hotel for Abramowitz and then joined Selik at Greenfield's from where they went to Harper Hospital in a taxicab and effected Abramowitz's release (R. 777, 778, 366); that Abramowitz was in a weakened condition, that he was taken to Greenfield's

where he drank some milk and where it was decided that he was so weakened by loss of blood that he should not be permitted to remain alone in a hotel room (R. 778); that thereupon Selik agreed to take Abramowitz to his own apartment to be given care by Mrs. Selik (R. 780); that Abramowitz was on parole at this time, and that, as Selik testified and Abramowitz admitted (R. 408), a few years previous, Selik, while on parole from Michigan, had been hurt in an automobile accident near Chicago and at that time Abramowitz took care of Selik in his apartment in Chicago (R. 768).

The defendant Fleisher, testifying in his own behalf, absolutely denied knowledge of or participation in the Pontiac robbery (R. 713).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner contends that his trial by the State of Michigan, considered in its totality, was essentially unfair and that this (together with the affirmance of his conviction and sentence by the Michigan Supreme Court) resulted in a denial of the due process of law guaranteed to him by the Fourteenth Amendment, requiring this Court to grant certiorari.

This Court recognizes the proposition that procedural due process of law means merely an essentially fair trial. *Adamson v. California,* 332 U. S. 46, 53, 57; *Moore v. Dempsey,* 261 U. S. 86, 91, and that "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice," *Lisenba v. Cal.,* 314 U. S. 219.

The due process clause of the Fourteenth Amendment precludes: a trial dominated by a mob, *Moore v. Dempsey, supra;* convictions secured by confessions obtained by "third degree" methods, *Brown v. Miss.*, 297 U. S. 278, 286; *Chambers v. Florida*, 309 U. S. 227, 235; *Ashcraft v. Tenn.*, 322 U. S. 143, 155, 327 U. S. 274; *Malinski v. New York*, 324 U. S. 401; and convictions obtained through the use of testimony known by the prosecuting authorities to be perjured. *Mooney v. Holohan*, 294 U. S. 103; *Hysler v. Fla.*, 315 U. S. 411, 413. The requirements of due process likewise strike down a judgment based on a plea of guilty induced by deception of state officers, *Smith v. O'Grady*, 312 U. S. 329, 334; cf. *Walker v. Johnston*, 312 U. S. 275, 286; or reached in proceedings wherein counsel was wrongfully denied or withheld, *Powell v. Ala.*, 287 U. S. 45; *Ex Parte Hawk*, 321 U. S. 114; *Williams v. Kaiser*, 323 U. S. 471; or based upon an irrational presumption, cf. *Tot v. U. S.*, 319 U. S. 463; or reached after arbitrary curtailment of the trial, *Thomas v. District of Columbia*, 90 F. (2d) 424 (App. D. C.). Furthermore this court has held that "due process" demands observance of certain universally recognized rules of evidence. *Tot v. U. S., supra.* All this is true because these things are essentially unfair. cf. *Palko v. Conn.*, 302 U. S. 319.

Whereas the early decisions of this court, after the adoption of the Fourteenth Amendment, restricted its operation to relatively narrow limits, nevertheless in more recent years this court has so enlarged the scope and effect of the Fourteenth Amendment as to include many, if not all, of the specific rights guaranteed the individual by the so-called "Bill of Rights" Amendments. The fundamental rights now held to be protected by the Fourteenth Amendment are those "of such a nature that they are included in the conception of due process of law". *Twinning v. N.*

J., 211 U. S. 78: because they are "of the very essence of a scheme of ordered liberty," *Palko v. Conn., supra.*

Further and by way of illustration of its expanding scope this court has recently held that certain rights guaranteed by operation of the First Amendment have now been included within the protection afforded by the Fourteenth Amendment against action by state authorities; *Everson v. Board of Education,* 330 U. S. 1; *Bridges v. Cal.,* 314 U. S. 252.

Likewise this Court has recognized the necessity of judicial review imposed on it by the Fourteenth Amendment's guarantee of due process, to consider, "upon the whole course of the proceedings" and trial, whether such proceedings "offend those canons of decency and fairness" which express our notions of justice toward those charged with any crime whatsoever, even those charged with the most heinous offenses. *Adamson v. Cal., supra.*

Furthermore, we contend that State action inhibited by the due process clause of the Fourteenth Amendment is neither limited by nor necessarily inclusive of all the specific provisions of the so-called Bill of Rights Amendments because due process, within the purview of the Fourteenth Amendment, is of an elastic, quick nature, expanding or contracting in manner and to the extent required to insure a fair trial to every individual subjected to criminal prosecution by any one of the several states. "The amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the Federal Government *nor is it confined to them.*" (Emphasis added.) *Adamson v. Cal., supra.*

This being so, then it must follow that the many procedural improprieties incident to the instant prosecution

of Petitioner by Michigan, not heretofore specifically designated by this court as violative of the due process clause of the Fourteenth Amendment could be so essentially unfair as to require them to be catalogued by this court as being violative thereof.

We respectfully submit that in the case at bar, in view of a factual situation raising very grave doubt of guilt, Michigan has accorded petitioner judicial process which, considered in its totality, was so essentially unfair as to violate the due process clause of the Fourteenth Amendment.

QUESTIONS PRESENTED

Whether the due process of law guaranteed by the Fourteenth Amendment is denied a defendant (one of five co-defendants) charged with armed robbery where:

(1) the trial court, sustaining an improper objection to a proper question put to a principal state's witness by defense counsel on cross examination, thereby unduly curtailed, if it did not absolutely deny, proper cross examination on a matter of basic importance;

(2) during the progress of the trial the court, in chambers and not within the knowledge or presence of the defendant or his counsel, interrogated a member of the jury concerning a chance, out of court, meeting during the progress of the trial between the defendant and the particular juror privately interrogated by the court[5];

(3) after the jury began its deliberations, it not appearing to be deadlocked, the trial court gave it an unsolicited

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[5] The transcript of the record of this interrogation (R. 876-882) is set forth herein commencing at pp. 49-54 of Appendix A.

supplemental charge[6] urging agreement on a verdict and within a few minutes thereafter the jury returned a verdict of guilty; it appearing thereafter from the affidavit[7] of at least one member of the said jury, that affiant construed said unsolicited charge of the court as a direction from the trial court that "* * * the jurors of the minority opinion should agree with the majority, regardless of their own reasoning or opinion * * *";

(4) in the presence of the jury, the prosecuting attorney (not provoked by defendant or his counsel) made a statement necessarily calculated to draw the jury's attention to the alleged guilty involvement of the defendant in an entirely separate, distinct and widely publicized murder conspiracy case, the trial of which had been held immediately prior to the trial of the case at bar;

(5) the prosecuting attorney, in the presence of the jury, made highly improper statements whereby, in effect, he "testified" on a material issue by way of circumventing the rule excluding hearsay testimony and the trial court refused to instruct the jury to disregard said improper statements;

(6) the cumulative effect of many improprieties by the prosecution and/or trial court resulted in an unfair trial.

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[6] This unsolicited charge to the jury (R. 1021-1023) is set forth at pp. 55, 56, Appendix B.

[7] This affidavit (R. 1085-1087) is set forth as Appendix C to the annexed brief (pp. 57-59).

JURISDICTION

The order of the Michigan Supreme Court denying petitioner's appeal from his said conviction and sentence was entered October 4, 1948 (R. 1211) and its order denying rehearing was entered November 12, 1948 (R. 1212). The order of a Justice of this Court extending to and including March 31, 1949 the time within which to petition for certiorari was entered February 2, 1949 (R. 1214).

Jurisdiction of this Court is invoked under Section 1257 of Title 28 U. S. C., as amended and revised; the pertinent provisions of which read:

> "Final judgments • • • rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> 1. • • •
> 2. • • •
> 3. by writ of certiorari • • • where any • • • right, privilege is specially set up or claimed under the Constitution, • • • of • • •, the United States."

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in part, "• • • nor shall any state deprive any person of life, liberty or property, without due process of law; • • •"

PRAYER

Wherefore, petitioner by his attorney, respectfully prays that this petition for a writ of certiorari to the Supreme Court of the State of Michigan be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

SUBJECT INDEX AND TABLE OF CASES AND STATUTES CITED

(See "Sub-index" prefacing annexed petition for writ of certiorari)

II.

OPINIONS BELOW[1]

The opinion of the Michigan Supreme Court affirming petitioner's conviction and sentence (R. 1201-1211) is reported commencing at p. 473 of Vol. 322 Michigan Reports. The order of the Michigan Supreme Court denying petitioner a rehearing (R. 1212) is not reported.

III.

JURISDICTION

(See p. 15 of annexed petition for writ of certiorari)

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[1] The Michigan Supreme Court refers to its opinion in the case of *People v. Chivas*, 322 Mich. 384 in disposing of petitioner's claim advanced herein commencing at p. 29 of this brief. Chivas was tried and convicted together with petitioner. He took a separate appeal to the Michigan Supreme Court and his conviction and sentence were likewise affirmed.

IV.

STATEMENT OF THE CASE

A summary statement of the case is set forth in the annexed petition for writ of certiorari, commencing at p. 2 thereof, and the same is hereby, by reference, incorporated in and made a part of this brief.

V.

QUESTIONS PRESENTED

The questions herein in this brief discussed and argued are set forth at pp. 13 and 14 of the annexed petition for writ of certiorari and the same are hereby, by reference, incorporated herein and made a part of this brief.

VI.

CONSTITUTIONAL PROVISION INVOLVED

(See p. 15 of annexed petition for writ of certiorari)

VII.

ARGUMENT

QUESTION No. 1

SUMMARY OF ARGUMENT

Curtailment of petitioner's cross-examination of a principal state's witness resultant from prejudicial observations by the trial court sustaining an improper objection by the special prosecutor was so essentially unfair as to deprive the defendant of the protection of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

During cross-examination of state's witness Luks by counsel for this defendant, the following occurred (R. 226-227):

> "Q. I believe you told Mr. Kennedy this morning that the reason you went there was because you thought it was the nearest place where you could contact Mike and the rest of the fellows?
>
> "Mr. Sigler: Now, if the Court please, I submit that is improper. *It is so trivial it is silly.*
>
> "Mr. Bond: I object to the last remark.
>
> "The Court: *Of course, you are asking about a very minor detail and a very slight irregularity.*
>
> "Mr. Bond: I was predicating another question on this particular one.
>
> "The Court: What I am getting at, *you are dealing with things that are very unimportant to find some deviation that probably is very unimportant.*"

Defense counsel attempted no further cross-examination of state's witness Luks along this line because of the court's ruling as set forth above.

Prior to this Luks had testified that Selik telephoned him at Lansing, Michigan, and asked him to come to Detroit (R. 170) but that Selik had not told him where to meet him (R. 189); that Mahoney's name or place of business was not mentioned (R. 194); that although he had met Mahoney only once previously and could not remember where (R. 168) and in spite of the fact that always previously he had met Selik at a saloon miles distant from petitioner's coffee house, he nevertheless went from the railroad depot (R. 171) straight to petitioner's coffee house (R. 171, 190). The record is barren of any showing that state's witness Luks had ever been at petitioner's coffee house prior to the night of December 1.

LAW AND ARGUMENT

Petitioner here contends that the court's characterization of this line of cross-examination as "• • • *very unimportant,*" precluded cross-examination on a vital matter.

The use of the words "trivial and silly" by the prosecutor, presumably in making an objection, was improper and the trial court not only should have sustained counsel's objection to the special prosecutor's remarks but also should have permitted counsel to proceed with this line of cross-examination. Instead the court sustained the prosecutor's objection thereby forcing counsel to abandon his cross-examination aimed at Luks' highly improbable story on prior direct and cross by other counsel concerning his reasons for going to petitioner's coffee house on the night in question, rather than to the bar where he had always

previously met Selik. This line of cross-examination might well have utterly destroyed Luks' credibility. Had this been accomplished, the prosecution's case necessarily fell. Certainly cross-examination on this important matter should not have been characterized as "*very unimportant.*"

Searching cross-examination of state's witness Luks at this very point well might have exposed some of the deep mystery about this case (and particularly about the stories of the two principal state's witnesses) that the student of this record cannot but sense.

A full cross-examination of a witness upon the subject of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called and a denial of this right is a prejudicial and fatal error. *Alford v. U. S.*, 282 U. S. 687.

While it is true that the matter of the ultimate extent of cross-examination rests in the sound discretion of the trial court, *Storm v. U. S.*, 94 U. S. 76; *Blitz v. U. S.*, 153 U. S. 308; *Glasser v. U. S.*, 315 U. S. 60; nevertheless the rule provides that the court's discretionary power to limit cross-examination may not be exercised until *after* the right has been *substantially and fairly exercised.*

Because petitioner was thus cut off at the very beginning of an entirely proper line of cross-examination, the discretionary power of the trial court to limit cross-examination was prematurely exercised and this constituted "prejudicial and fatal error." *Alford v. U. S., supra.*

It is universally recognized that the trial court must exercise extreme caution in the matter of comments made in the hearing of the jury incident to promulgation of rulings and otherwise.

The harm done when the trial judge departed from that attitude of disinterestedness which is the foundation of a fair and impartial trial was not diminished because he so acted through inadvertence and was not intentionally unfair. *Williams v. U. S.*, 93 F. 2nd 685.

This court has most recently restated the fundamental law of the land concerning the unquestioned right of a defendant ... a criminal case to full, free and uninhibited cross-examination of state's witnesses in *Alford v. U. S., supra.*

In the Alford case, this Court reversed a conviction because the trial court (sustaining an appropriately couched if legally improper objection to a question put to an important state's witness on cross-examination) precluded defense counsel from exploring a line of cross-examination calculated to demonstrate the bias and/or other motive (or motives) that *might* have impelled the state's witness to testify as he had on direct. "The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error" (Alford decision p. 694).

The factual parallel between the Alford case and the case at bar is strikingly similar in so far as relates to the matter of denial of cross-examination. In this respect the two cases may fairly be said to be on all fours.

The necessary consequence, in our case, of the characterization by the trial court of defense counsel's line of cross-examination as "very unimportant" was certainly to cut off "in limine" all cross-examination of state's witness Luks bearing on the vital matters of his credibility, motives, and possible bias.

If, as the Alford case holds, "*it is the essence of a fair trial* that reasonable latitude be given the cross-examiner"

and that, "prejudice ensues from a denial of the opportunity to * * * put the weight of the (state's witness') testimony and his credibility to a test, without which the jury cannot fairly appraise them" (p. 692), then the cutting off of petitioner's cross-examination of state's witness Luks was necessarily so flagrant a violation of the rights guaranteed petitioner by the due process clause of the Fourteenth Amendment as to demand that this court issue certiorari because:

(a) Due process of law means merely *an essentially fair trial. Adamson v. Cal.*, 332 U. S. 46, 53, 57; *Moore v. Dempsey*, 261 U. S. 86, 91;

(b) As applied to a criminal trial, denial of due process is the (state's) failure to observe *that fundamental fairness essential to the very concept of justice. Lisenba v. Cal.*, 314 U. S. 219;

(c) Due process demands observance of certain *universally recognized rules of evidence. Tot v. U. S.*, 319 U. S. 463;

(d) The *fundamental rights* now held to be protected by the Fourteenth Amendment are those of such a nature that they are included in the conception of due process of law. *Twinning v. N. J.*, 211 U. S. 78;

(e) In these and other situations, immunities that are valid against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and, thus through the Fourteenth Amendment become valid as against the states. *Palko v. Conn.*, 302 U. S. 319, 325.

While we recognize that the Alford case involved the review by this court of a federal prosecution, nevertheless if

the right to reasonable latitude on cross-examination "*is the essence of a fair trial,*" then it necessarily follows that the Alford decision does, by force of logic and reason, operate to denounce in the case at bar the trial court's unreasonable limitation of petitioner's cross-examination of state's witness Luks as such a violation of the due process clause of the Fourteenth Amendment as would entitle petitioner to certiorari.

> "To suppose that 'due process of law' means one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. N. Y.*, 324 U. S. 415.

QUESTION No. 2

SUMMARY OF ARGUMENT

Two privately conducted interrogations of a juror by the trial court irreparably prejudiced petitioner and resulted in an essentially unfair trial, violative of rights guaranteed him by the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

Unbeknownst to counsel for the defendants, one of the jurors was called to the chambers of the trial judge on December 3, 1945, and interrogated by the court in the presence of his clerk and reporter (R. 876-882).[2]

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[2] Appendix A hereto consists of the record of the interrogations. (See pp. 49 to 54 hereof.)

LAW AND ARGUMENT

Juror Latta thought a member of the State Police was in petitioner's car at the time of the occurrence involved and it would appear that she at first assumed that the officer probably reported it to the Court. It is obvious that, following his first interrogation of Mrs. Latta, the court then discussed the matter with the State Police and Special Prosecutor. Mrs. Latta thereafter was recalled for the purpose of being informed that she should not in any way blame either the State Police or the Special Prosecutor for her predicament. At the conclusion of this second interview, she stated to the court (R. 881):

> "Mrs. Latta: In my mind, I thought, *he* has told Kennedy[3] and trying to make something out of it."

It would appear that, after being assured that neither the State Police nor the Special Prosecutor had reported the incident to the court, Mrs. Latta was then disposed to blame *petitioner* for the situation that had arisen.

The rule that the trial judge shall not communicate privately with the jurors (or any of them) at any stage of a trial is well established. A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. *Hopt v. Utah*, 110 U. S. 574. Communications between trial court and jury should take place only in open court in presence of counsel for the respective parties and in the presence of defendant if he be charged with a felony, unless he voluntarily absents himself, for the jury system is founded upon the theory that a disinterested jury will hear evidence in open court and on

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[3] "Kennedy" as referred to by juror Latta was E. H. Kennedy, counsel for defendants Fleisher and Selik.

such evidence alone deliberate among themselves until the verdict is reached, and private communications although harmless in themselves may open the way to abuses and destroy confidence in legal procedure and in the judiciary. *Ray v. U. S.* 114 F. 2nd 508 cert. denied 311 U. S. 709. See also *Hinson v. State,* 133 Ark. 149, 201 S. W. 811; *Texas Midland R. Co. v. Byrd,* 102 Tex. 263, 115 S. W. 1163.

Conceding that every instance of improper communication between the trial judge and a juror would not of necessity be violative of the due process clause of the 14th Amendment, petitioner nevertheless asserts that the results of the private communication here complained of were so prejudicially harmful to him as to deprive him of a fair trial.

We complain not necessarily because the private meeting between the judge and the juror took place but because the results of that meeting, all circumstances considered, were such as to hopelessly prejudice petitioner in the estimate of the juror involved and probably in the estimation of those other jurors with whom said juror was particularly friendly.[4]

If the result of this private communication between trial court and Mrs. Latta was to prejudice petitioner in her estimation, then the impartiality of the jury was thereby destroyed and the petitioner denied the protection of the due process clause of the Fourteenth Amendment.

> "• • • Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict

[4] Another juror, a Mrs. Ganfield, rode with juror Latta to and from the trial each day and was with Mrs. Latta at the time of the occurrence in question (R. 876, 877).

the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio,* 273 U. S. 510, 532.

"* * * If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict." *Baker v. Hudspeth,* 129 F. (2d) 779, 782 (C. C. A. 10th), cert. denied 317 U. S. 681, 711, 318 U. S. 800.

The fact that this Court has not heretofore held a private communication between trial judge and juror to be violative of the due process clause of the Fourteenth Amendment is no bar to the sufficiency of our claim that such was the result in the instant case.

The judicial concept of that which may constitute a procedural violation of the due process clause of the Fourteenth Amendment it always subject to investigation in the light of the particular circumstances involved; said concept must of necessity be quick, elastic and mutable and its scope and application must be ascertained from time to time by judicial review and action. For as this Court recently held "the Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government *nor is it confined to them* * * *." " * * * The due process clause of the Fourteenth Amendment has an independent potency * * *" "A construction which shall give to due process no independent function * * *. would de-

prive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time other than those which had become manifest in 1791 * * *." *Adamson v. Cal., supra* (emphasis added); *In re Oliver*, 333 U. S. 257, 280.

The hereinbelow set forth statement of Mr. Justice Roberts does, we submit, most aptly bespeak the rule here contended for by petitioner.

> "* * * in the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of this rule." *Snyder v. Mass.* (dissent), 291 U. S. 97, 131.

The two privately conducted interrogations of a juror by the trial court during the progress of petitioner's trial was, in view of the prejudice to petitioner flowing as a result thereof, so necessarily harmful to him as to mark his trial with an unfairness wholly violative of the due process clause of the Fourteenth Amendment.

QUESTION No. 3

SUMMARY OF ARGUMENT

The trial court coerced the jury's verdict with an unsolicited, supplemental charge which directed the jurors in the minority to conform their opinion with the majority's opinion. This was unfair and necessarily violative of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

The jury retired for deliberations sometime before lunch on December 6, 1945 (R. 1014). At about 3:00 p. m. on December 7th, while still carefully deliberating and not in any sense "deadlocked," the jury was brought back at its request for the reading of certain testimony (R. 1016). Some testimony was read to them (R. 1017-1021).

Thereafter, and sans solicitation, the court gave the jury a supplemental instruction urging it to agree on a verdict (R. 1021-1023).[5]

Immediately thereafter, the jury returned a verdict of guilty as to all defendants (R. 55, 1060). The jury was then polled individually on the question of the guilt or innocence of each defendant.

Months after the trial, one of the jurors (one Lulu Grogan) filed an affidavit (R. 1085-1087), wherein she stated in substance that this supplemental instruction was understood by her as a direction to the minority to agree with the majority, and that as a consequence, the jury thereupon ceased deliberations and she abandoned her honest opinion that the defendants were not guilty.

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[5] Appendix B hereto is the text of the supplemental charge.

LAW AND ARGUMENT

We submit that there can be no doubt but that the effect of the supplemental charge here complained of was coercive especially if consideration can properly be given to the affidavit of Juror Grogan (R. 1085-1087).*

Whereas it is the general rule that jurors may not impeach their own verdict, nevertheless this Court has held that under certain circumstances the affidavit of a juror may properly be received and considered by the court on the question of the existence of an alleged extraneous influence, if not as to how far such extraneous influence operated and affected the mind of the juror.

> "So a juror may testify in denial or explanation of acts or declarations outside the jury room. * * * it is vital * * * that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. U. S.*, 146 U. S. 140; *U. S. v. Reid*, 53 U. S. 361.
>
> See also *Hyde v. U. S.*, 225 U. S. 347.

We submit therefore that this Court may properly consider the Grogan affidavit as bearing upon the existence of an extraneous influence (the unsolicited, supplemental charge in question) that may have affected this jury's verdict.

However, should the court decide that it cannot properly give consideration to the Grogan affidavit, we contend nevertheless that the supplemental charge complained of does itself bespeak a patent coercion of the jury's verdict.

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* Appendix C hereto is the affidavit of Juror Grogan.

While we find no case indicating that this Court has held that coercion of a jury's verdict resultant from an unsolicited supplemental instruction constituted violation of the due process clause of the Fourteenth Amendment nevertheless it would appear that coercion of a verdict ever has been held erroneous because it was essentially unfair. For see: *Stewart v. U. S.*, 300 Fed. 769 (C. C. A. Mo. 1924) where a jury had deliberated many hours, a supplemental instruction having been given to the effect that it would be highly desirable for the jury to reach a verdict if the jury could do so "consistently and by consultation with each other," such supplemental instruction was held erroneous as having too strong a tendency towards coercion of the minority of the jury.

Wissel v. U. S., 22 Fed. 2d 468 (C. C. A. N. Y. 1928), where the appellate court held that the trial judge may not command or coerce a verdict of guilty and that the jury must be left free to reach its own conclusions and record its conscientious convictions.

Chicago and E. I. R. Y. v. Sellars, 5 Fed. 2d 31 (C. C. A. Mo. 1925), where the court held erroneous, supplemental instructions as to the desirability of the jury agreeing upon a verdict.

The jury should be left free to act without any coercion on the part of the court, which should not unduly press the jury to agree upon a verdict. *Hyde v. Georgia*, 26 S. E. 2nd 744, 196 Ga. 475.

No judge shall attempt to coerce the jury to agree upon any particular verdict. *People v. Moore*, 25 N. Y. S. 2nd 206, 261 App. Div. 876.

Michigan followed this rule consistently up to the decision in the instant case (*People v. Fleisher*, 322 Mich. 474). For see: *People v. Kasem*, 230 Mich. 278, wherein it was

held "the rule that an instruction on the part of the court which *may* coerce the jury into agreeing upon a verdict constitutes reversible error seems well established" (emphasis added). See also *Nick v. U. S.*, 122 F. 2nd 660, cert. denied 314 U. S. 687.

The fact that the verdict was returned within a very few minutes after the jury received the supplemental instruction is, we submit, proof positive that wittingly or no the effect of this belated instruction was to coerce the jury's verdict.

It will be noted that the trial court did not consider the matter of the jury's duty to attempt to agree upon a verdict as important enough to merit mention in his original charge and the delivery of this supplemental charge at the crucial moment when given must necessarily have swept from the minds of the jury an awareness of their paramount duty to give full consideration to the vital rules of law contained in the instructions originally given and concerning burden of proof, reasonable doubt, presumption of innocence, etc. The jury must have received the erroneous impression that all that mattered was an *unanimous verdict*.

The trial court did not follow the objectionable instruction with any restatement of the essential portions of his charge as originally given.

If it be true that this supplemental charge was improper because of its coercive nature, the ultimate question "does such a coercive, supplemental charge amount to a violation of the due process clause of the Fourteenth Amendment" is presented.

The coercion of the jury's verdict here resultant from the supplemental charge was in fact a failure by the trial court to observe one of "• • • those general rules estab-

lished in our system of jurisprudence for the security of private rights." *Hagar v. Reclamation District*, 111 U. S. 708. It amounted to the conduct of a criminal trial by Michigan not in accordance with "• • • the ordinary forms of criminal prosecution in the state • • •," *Caldwell v. Texas*, 137 U. S. 697. The coercive, supplemental charge in question constituted such a failure by the trial court to conform to "• • • fundamental standards of procedure • • •" as to preempt the due process clause of the Fourteenth Amendment (*cf. the dissent of Mr. Justice Murphy in Adamson v. Cal.*, 332 U. S. 46).

The very same argument heretofore advanced in this brief at pp. 27 and 28 is by reference incorporated here in support of our claim that a coercive, supplemental charge in a criminal trial was a violation of the rights insured petitioner by the due process clause of the Fourteenth Amendment.

This argument runs—the scope of the due process clause of the Fourteenth Amendment is not rigidly limited but is, on the contrary, an elastic concept affected, to a greater or a lesser extent, by the factual situation involved. Any impropriety on the part of the state, which by its very nature and because of the prejudicial consequences thereof taints a criminal trial with essential unfairness, is violative of the due process clause of the Amendment quite irrespective of whether or not this Court has or has not heretofore catalogued the impropriety in question among those historically and traditionally conceded to be so violative of due process as to demand this Court to review and correct the judicial process of an offending state.

> "Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to

this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past, but a standard for judgment in the progressive evolution of the institutions of a free society." *Malinski v. N. Y.*, 324 U. S. 401, 414.

Furthermore, this Court has held "what constitutes due process of law depends on circumstances" *Moyer v. Peabody*, 212 U. S. 78, 84, presumably to be "ascertained from time to time by judicial action." *Twinning v. N. J.*, 211 U. S. 78.

QUESTION No. 4

SUMMARY OF ARGUMENT

The highly improper remarks by the prosecutor calling the jury's attention to petitioner's alleged guilty involvement in and connection with an entirely separate and distinct prosecution for conspiracy to murder but recently concluded to the accompaniment of unprecedented publicity, were so essentially unfair as to vitiate the protection of the Fourteenth Amendment to which petitioner was entitled.

RELEVANT FACTS

On direct examination by the special prosecutor, state's witness Abramowitz testified that he was a witness "in the Battle Creek case and so was Henry Luks" (R. 484).

This so-called "Battle Creek case" was the widely publicized trial in the City of Battle Creek, Calhoun County, Michigan, in July, 1945, of petitioner, Harry Fleisher, Louis Fleisher, and Myron Selik, on a charge of conspiracy to murder State Senator Warren G. Hooper. Said prosecution was initiated by warrant issued by a so-called "one man grand jury" then being conducted in

Ingham County, Michigan, by a then Circuit Judge who is now a member of the Michigan Supreme Court. Mr. Kim Sigler (elected Governor of Michigan in 1946) was Special Prosecutor for this "one man grand jury" and he prosecuted the so-called "Battle Creek case." Mr. Sigler likewise prosecuted the case at bar as a Special Prosecuting Attorney for Oakland County, and he had functioned as Special Prosecutor for the Oakland County "one man grand jury" that issued the complaint and warrant herein.

Furthermore, and most significantly, the State's principal witnesses in the "Battle Creek case" were the very pillars of the instant prosecution, i.e., Abramowitz and Luks, who, as here, were given immunity from prosecution even though both had previously been convicted of three felonies and were, as a consequence, subject to life imprisonment under Michigan habitual criminal law if again convicted of a felony. All defendants in the "Battle Creek case" were convicted, but on appeal, the Michigan Supreme Court set aside Petitioner's conviction "without a new trial" (see *People v. Fleish*, 321 Mich. 443).

After Abramowitz had testified that he was a witness "in the Battle Creek case" (R. 484) and while he was being cross-examined by counsel for the defendants Fleisher and Selik, the following occurred (R. 484-486):

"*Re-cross Examination*

By Mr. Kennedy:

Q. To get right down to it, when you were arrested back in Mason, Michigan, you were arrested and charged with the murder of Senator Hooper?

A. I was not charged with anything. All they did, they asked me did I know Harry Fleisher and Pete Mahoney and Mike Selik and Charlie Leiter and a few others.

Q. They never accused you of being implicated in the killing?

A. Never.

• • • • •

Q. Were you questioned about your presence in the City of Albion?

A. I was not.

Q. At any time?

A. No, not at that time.

Q. Well, that time. Maybe I wasn't fair when I shot at you at any time. I specifically ask you, Sam, whether or not after the 27th of March, 1945, you were told by certain police officers that a picture of yourself had been picked out by a Mrs. Iris Brown, the manager of a tavern in Albion, Michigan, and identified as looking like the man who was in her bar-room in Albion on the 11th of January, 1945?

A. That I said that?

Q. No, were you ever given that information and told that?

A. I don't recall that.

Q. You certainly would remember that.

Mr. Sigler: Now, your Honor, I move that remark be stricken from the record. If the Court please, that is a clear fabrication and imagination on the part of counsel.

The Court: I didn't get it.

Mr. Sigler: Something about a woman in this bar picking this man out as being in the bar on a certain occasion. *As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar.*

Mr. Bond (trial counsel for petitioner): If the Court please—

The Court: These remarks may be stricken. That last remark of Mr. Sigler may be stricken and the jury instructed to disregard it."

LAW AND ARGUMENT

While it is true that the court instructed the jury to disregard the highly prejudicial remark of the Special Prosecutor—

> "As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar" (R. 486)—

the statement was so palpably unfair to petitioner (especially so in view of the subsequent vindication of petitioner by the Michigan Supreme Court) that its very utterance in the hearing of the jury precluded the possibility of his receiving due process of law at this trial. The court's admonition to ignore the thrust could not and did not cure the fatal error. *Sunderland v. U. S.*, 19 Fed. 2nd 202, 216; *People v. Kolowich*, 262 Mich. 137.

Because of the unprecedented radio and newspaper publicity given to the Hooper case from the time of the killing (January 11, 1945) to and throughout the trial (July 16-31, 1945) of those accused of conspiracy to murder Senator Hooper, and up to and throughout the trial of the case at bar, it is inconceivable that the jurors trying petitioner were not only aware of the Hooper case but it is probably true that to a greater or lesser extent these jurors were incensed and exercised by the fact that those found guilty of conspiring to murder the senator had received relatively piddling and inadequate prison terms of from 4½ to 5 years. (See *People v. Fleish, et al.*, 321 Mich. 443).

It is therefore only reasonable to assume that the natural consequences of the gratuitous albeit highly objectionable statement of the Special Prosecutor was utterly devastating and entirely unfair in that his said statement:

(a) identified Petitioner Mahoney to the jury as one of those convicted of conspiracy to murder Senator Hooper;

(b) tended to suggest to the jury that by convicting Mahoney (whether or no he be guilty of the crime charged) it would be possible by imposition of a severe penalty (armed robbery in Michigan requires a term of imprisonment for any number of years up to and including life) to adequately punish defendant for his part in the Hooper killing; and

(c) ignored the pendency of petitioner's (successful) appeal in the said Hooper case.

It is not reasonable to assume, recognizing human nature for what it is, that the jury trying petitioner could have received this pregnantly vicious statement of the Special Prosecutor without having become irreparably biased against petitioner and that it could retain that degree of aloof impartiality universally conceded to be an indispensable prerequisite to a fair trial. *Tumey v. Ohio,* 273 U. S. 510, 532. *Cf. Ex parte Wallace,* 152 P. 2nd 1 (Cal.).

It is apparent that the statement of the Special Prosecutor was not provoked by petitioner or his counsel but was purely and simply an unethical (nonetheless highly effective) device whereby the Special Prosecutor sought to (and undoubtedly did) bolster his case against the petitioner with what the jury must surely have considered as "testimony" emanating from the then highly regarded Special Prosecutor of the fabulously publicized Ingham County "one man grand jury"; the essential unfairness whereof being exceeded only by the gross shabbiness of

the artifice utilized by the Special Prosecutor in his successful attempt to secure the conviction of petitioner.

The rule requiring scrupulous fairness on the part of the Prosecuting Attorney is well recognized and deeply rooted in our jurisprudence as a basic and fundamental requirement of due process. The prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction. "The prosecutor may strike hard blows but he is not at liberty to strike *foul* ones." *Berger v. U. S.* 295 U. S. 78. A prosecuting official is an officer of the court charged as much with the duty of freeing the innocent as convicting the guilty, and charged always with the duty of according a fair trial. *Mooney v. Holohan,* 294 U. S. 103; *Malinski v. New York,* 324 U. S. 401. Prosecutors must remember that the accused is entitled to a fair trial and that they are duty bound not to take advantage of their official position to deprive him of such right. *People v. Burnette,* 102 P. 2nd 799 (Cal.). It is the duty of the court and of the prosecutor to see that defendant's fate is not prejudiced or settled by any forbidden or untoward methods. *People v. Johnson,* 284 N. Y. 182, 30 N. E. 2nd 465.

The statement[7] was, of course, highly improper (apart from its essential inflammatory nature) by reason of the fact that it brought to the attention of the jury petitioner's involvement in another and entirely unrelated offense.

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[7] The record here is replete with evidence of similarly unfair and grossly improper tactics employed by the special prosecutor. See the objectionable remarks as set forth herein at p. 19 and again those at p. 44. Where the misconduct of the prosecutor is "pronounced and persistent with a probable cumulative effect upon the jury," a new trial must be awarded. *Berger v. U. S., supra.*

Prosecuting Attorneys must refrain from placing before the jury directly or indirectly any fact or circumstance which would not be regularly admissible. *Wortham v. State,* 115 S. W. 2nd 650 (Tex.).

Counsel must never endeavor wilfully, knowingly and insistently to inject into a case matters wholly illegal and inadmissible in order to fasten a conviction on a person charged with a criminal offense. *Moore v. State,* 9 S. O. 2nd 146 (Ala.).

Conceding that not every instance of this type of impropriety on the part of a prosecuting attorney would warrant this court's intervention under the due process clause of the Fourteenth Amendment, nevertheless when the end product of such impropriety is so palpably unfair as to preclude any result other than conviction, then certainly the protection of the due process clause must needs be invoked for where the conduct of a criminal trial is involved due process requires not only that justice be accomplished, but rather that the verdict, whatever it be, shall have been achieved by fair means. *Snyder v. Mass.,* 291 U. S. 97, 137.

The ultimate and controlling question is therefore: Were the consequences of this statement by the Special Prosecutor so obviously harmful to petitioner as to challenge this Court's review to determine whether his trial was so unfair as to be violative of the due process clause of the Fourteenth Amendment.

We contend that to pose the question is, in the light of the settled law and the factual situation present, to answer it in the affirmative.

Nor should the fact that this court has not heretofore found it necessary to hold that such an impropriety as is here in question was violative of the due process clause

of the Fourteenth Amendment necessarily bar the court from reviewing petitioner's trial, conviction and sentence, if, as we contend the effect of the objectionable statement by the Special Prosecutor was to preclude or to tend to preclude petitioner from receiving a fair trial.

In the interest of brevity we once again presume to refer to the court to pp. 27 and 28 of this brief for the argument that the scope of due process is not necessarily limited, prescribed and predetermined but that on the contrary it is a living, expandable concept.

The Special Prosecutor's remark here complained of constituted a violation of due process not only because the consequences whereof were so necessarily destructive of petitioner's right to a fair trial but also because it involved gross violation of the universally recognized rules of evidence prohibiting the knowing and wilful injection into the case by the Prosecutor of matters wholly illegal and inadmissible. Cf. *Tot v. U. S.*, 319 U. S. 463; *Moore v. Alabama, supra; Miller v. U. S.*, 120 Fed. 2nd 968, 973. All these decisions bespeak the law denouncing failure by the prosecution to observe fundamental and essential rules of evidence.

The flagrant breach of such rules in the instant case necessarily resulted in a trial so essentially unfair as to have offended those canons of decency required by the due process clause of the Fourteenth Amendment to have been observed by Michigan on the trial of petitioner.

QUESTION No. 5

SUMMARY OF ARGUMENT

The grossly improper statements of the Prosecutor, whereby he in effect "testified" on a material point, and whereby he sought to circumvent the operation and effect of the general rule excluding hearsay, were so essentially unfair as to deny petitioner the protection of the due process clause of the Fourteenth Amendment.

RELEVANT FACTS

The testimony showed that a car used by the bandits on the night of the robbery belonged to state's witness Eisner (R. 358, 318, 329), who testified that he owned a Tudor Pontiac Sedan that he sometimes loaned to friends (R. 319); that on December 1, 1944 he loaned said car to one Hyman Niskar (R. 320); that the car was returned to his house (R. 320) and that on the morning of December 2, 1945 while he was driving two lawyers to downtown Detroit (R. 322) one of these lawyers mentioned a large pool of blood that he saw on the floor mat in the rear section of the car. No foundation was laid for the impeachment of Eisner by the prosecution (R. 316-329) nor was his testimony impeached.

Niskar was not produced as a witness and his name was not endorsed on the information prior to the trial. Whereas during the course of the trial, it became apparent that Niskar was a vitally important, *res gestae* witness, the prosecution nevertheless refused to endorse him as such, and the trial court upheld the prosecutor's refusal.

State's witness Edward V. Johnson, a Michigan State Police Detective, testified on direct examination that he first learned about Hyman Niskar's having borrowed

Eisner's car about a month previous to the trial of this case (R. 682) and thereupon took some steps to locate him (R. 683). On cross examination, Johnson again stated unequivocally that the request to locate Niskar was made to him about one month before the trial started on October 23, 1945 (R. 683). Later Johnson hedged on this testimony and stated that he would have to consult his records to be able to give the exact date (R. 683). The next day, Johnson testified that it was after the trial started that he first learned anything about Niskar having borrowed Eisner's car on the night preceding the Pontiac robbery (R. 753). State's Witness Morse, a Michigan State Police Lieutenant, testified that he first learned about Niskar borrowing the Eisner car on either the first or second day of the trial herein (R. 907-909); that this information came from Eisner while he and Eisner were in the lobby outside the courtroom. The actual selection of the jury was not completed until November 1, 1945 (R. 149).

It is therefore apparent that the prosecutor and his staff knew that state's witness Eisner had loaned his car to Hyman Niskar (on the night preceding the robbery at Pontiac) either one month before the start of the trial or at least seven days before a jury was finally impanelled on November 1, 1945.

Defense counsel repeatedly raised the question about the necessity of endorsing and calling Niskar as a state's witness (R. 464, 509-512, 521-523, 682-684, 751-753, 807-823, 855-869, 875, 899-907, 908-929). The court having refused to require the endorsement of Niskar as a state's witness also denied defense motions for a continuance so that they might attempt to call Niskar as a witness (R. 930).

Defense witness Carl F. Wixom testified on November 30th that Niskar had been in Chicago on October 21st, October 25th, October 30th, November 3rd, November 6th, November 15th, and had made or received long distance calls on those days, some of them being traced to Chicago hotels (R. 807-821). There was no showing that Niskar would have refused to testify if he had been located, and no suitable showing that the prosecution had made efforts to contact him in Chicago, and no time was allowed the defense to do so.

On direct examination of Lieutenant Morse (and after Eisner had testified in the manner hereinbefore described) the Prosecutor asked Morse whether Eisner had not told him, prior to said conversation in the court lobby, that he loaned his automobile to one of the defendants. This question was objected to as calling for "hearsay", the court sustained the objection and thereupon the Special Prosecutor stated in the presence of the jury:

> "Prior to that day Mr. Eisner made certain claims about his automobile" (R. 917); and again
>
> "Prior to that date Mr. Martin Eisner claimed one thing—" (R. 918).

Motions for a mistrial were made and denied and the court gave no instruction to the jury to disregard the Prosecutor's prejudicial statements (R. 921, 925).

LAW AND ARGUMENT

The objectionable statements of the Special Prosecutor here complained of, following, as they did, an obviously improper question calling for an "hearsay" answer from state's witness Morse, reflected the disposition of the Special Prosecutor to prostitute his high office by seeking to "testify" himself whenever the need to reinforce

his case against petitioner should arise. The essential unfairness of such tactics was surely destructive of the fair trial guaranteed petitioner by the Fourteenth Amendment.

The asking by a Prosecutor of an improper question and the making of a prejudicial statement on a matter of vital import by a Prosecutor, as here, most certainly operated to preempt due process at this trial because of the recognized rule that a jury is generally disposed to consider the Prosecutor as an entirely unbiased seeker after the truth rather than as an irresponsible partisan concerned only with the winning of a lawsuit. *Berger v. U. S., supra.*

The Special Prosecutor was concerned at this point in the trial with attempting to gloss over an obvious weakness in his case against petitioner that developed as a result of the exposure of his refusal to produce as a state's witness one Hyman Niskar, the said Niskar apparently being possessed of knowledge that should probably have been very helpful to the jury, if not entirely conclusive on the question of guilt or innocence.[8]

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[8] If justice had been the aim of this prosecution, neither the special prosecutor nor the Court would have insisted on the case going to the jury until all reasonable efforts to produce Niskar's attendance and testimony had been exhausted.

If the stories of Luks and Abramowitz were discredited in material respect, the State's case against petitioner must of necessity collapse, for no witnesses (other than these thrice convicted felons who so readily sought to exchange petitioner's liberty for their own) implicated petitioner in the feloniously inspired ride to Pontiac taken by Abramowitz and Luks on the early morning of December 2, 1944.

After the People learned that it was the Eisner car that was used by the bandits and that Eisner claimed he had loaned it to Niskar, the duty to show the whole transaction made it incumbent on the prosecution to at least attempt to show the jury into whose possession the car had been

To surmount this difficulty the Special Prosecutor (quite oblivious of his sworn duty to be fair and to abide the rules of evidence) hit upon the device of attempting to vicariously impeach state's witness Eisner by asking state's witness Morse an obviously improper question, calling for an "hearsay" answer, calculated to convey *as fact* to the jury the *mere theory* of the prosecution that state's witness Eisner had misinformed the prosecuting authorities, that Eisner was probably lying in order to favor the defense and that the real truth was that Eisner had loaned the hold-up car to one of the defendants (as claimed but not *proven* by the state) and not to Hyman Niskar—as *was proved* by the uncontroverted testimony of state's witness Eisner.

When the Special Prosecutor was thwarted by defense counsel's timely objection in this palpably unfair and highly reprehensible attempt to circumvent the hearsay rule, he then stooped to the next most effective vehicle whereby he himself gratuitously, brazenly and with utter disregard for truth, justice and fair play, stated to the jury:

> "Prior to that day Mr. Eisner made certain claims about his automobile" (R. 917)

and later (presumably apprehensive lest he had not accomplished his improper purpose) he once again stated:

(Footnote continued)

given by Niskar. If Niskar had been called as a witness and testified that he had let Luks or Abramowitz have the Eisner car, the whole complexion of the case would have changed. The large quantity of blood noted in the Eisner car the next morning could not have been accumulated in the few seconds Abramowitz claimed to have been in it after he cut his arm (R. 405). Such a pool of blood might well have been deposited in the Eisner car if Abramowitz rode from Pontiac to Detroit in it, and, if he rode in that car, his story about Mahoney was false.

"Prior to that date Mr. Martin Eisner claimed one thing" (R. 918).

An accused has a right to trial in accordance with the rules of evidence, unhampered by circumvention thereof by statements or improper offers followed by endeavors to get excluded matters before jury. *People v. Allen*, 299 Mich. 242. Where from the record it definitely may be determined that a prosecuting official has deliberately framed a question in such a manner as to make it appear that it is a proper question, but which in truth is designed to elicit an answer which the prosecutor knows will place before the jury inadmissible evidence, the conduct of the prosecutor is so grossly improper as to require reversal. *People v. Collins*, 123 P. 2d 43 (Cal.).

Recognizing full well the general rule which prevents this court from invading the domain of the state courts in matters not usually considered as inherently germane to the question of due process (within the purview and operation of the Fourteenth Amendment) *Cf. Buchhalter v. N. Y.*, 319 U. S. 427, counsel nevertheless most strenuously contends that this particular impropriety was so grossly and wilfully indecent as to necessarily befoul petitioner's trial with an essential unfairness wholly violative of the due process requirements of the Fourteenth Amendment for "the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained but that the result whatever it may be, shall be reached in a fair way." *Snyder v. Mass.*, 291 U. S. 97, 137. Surely this conduct on the part of the special prosecutor failed to observe that fundamental fairness essential to the very concept of justice held by this Court to be required of the state by the due process clause of the Fourteenth Amendment.

QUESTION No. 6

LAW AND ARGUMENT

Petitioner hereby respectfully contends that, should this Court conclude that none of the specific instances of impropriety hereinbefore particularized requires this Court to issue its writ of certiorari, nevertheless the cumulative effect of all of said improprieties was to render petitioner's trial essentially unfair and therefore directly violative of the right to due process of law guaranteed by the Fourteenth Amendment. *Cf. Berger v. U. S. supra.*

APPENDIX A

Interrogation of Juror Latta by Trial Court (R. 876-882)

(December 3, 1945, the following was taken in the office of Judge Hartrick, before Court convened, in the presence of Judge Hartrick, Mrs. Edith Latta, the Court Clerk and the Court Reporter.)

The Court: I called you, Mrs. Latta, and the reason I have the reporter here is because I am not supposed to speak to you or say anything to you during the course of this trial, unless it is a matter of record. There is nothing to be alarmed about, but some information came to me that one of the parties connected with this lawsuit may have had some contact or some experience in connection with you. Now, I don't know whether there is any truth in the matter.

Mrs. Latta: Do you want me to tell you? I have an idea —one day, my car wouldn't start—I was coming out—that was at the very beginning—my car wouldn't go and different people would give me a push, and we were just in Pontiac, Mrs. Ganfield was in the car with me and I just motioned to the car in back of me and he pushed me and when he came along, I said, "Oh, I think that is Pete Mahoney", and the State Police was in the car, the State Police was in the back seat and I imagine that is what has been referred to.

The Court: Probably that is it, but I wanted to know.

Mrs. Latta: And there wasn't anything, he didn't say anything any more than he just pushed me and he went just as quick—when I got in the lot—it was the day we went home at noon, it was even before Mrs. Renwick was off the jury, it was on a Tuesday morning, but he didn't say one word to me and I didn't even get a chance to thank

him because he went so fast and this State Police I noticed, he came up this morning and he was in the car, and I imagine Davidson must have been, I don't know, but I know there was a State Police in the car. Mike Selik and Pete Mahoney was in the front seat and when Pete Mahoney got out, that is when I saw who it was, we were getting worried because it was getting close to the time to be here and we talked about it, Mrs. Ganfield and me and we thought, well, the State Police were there—

(Questions by the Court and answers by Mrs. Latta.)

Q. Who is Mrs. Ganfield?

A. She sits in the first chair.

Q. No word was said to you?

A. No, not one word and we have often said he had a good chance if he wanted to but he was just as embarrassed as I was. You know how you will, you just motion to the car in back of you and it was just one of those things that he was back of us but at the time we talked whether we should say anything and we thought, well, there was nothing said and the State Police was in the car and we couldn't see that there was anything—

Q. You probably should have said something about it to me and then if anybody had mentioned it to me, I could have passed it along.

A. If anybody said anything, but he didn't say anything to us he just gave us a push, there was nothing—

Q. Didn't even say a word to you?

A. He didn't say anything, he just as he pushed me in, he says, "Jesus, I hope nobody sees us" that is all he said and you know we talked about if anybody spoke to us and we figured that was really nothing that amounted to anything, that it was just one of those unfortunate situations that he happened to be the fellow back of me and I had a terrible time getting home, a piece of my timer had broken,

sometimes the spark would jump over, sometimes it would go and sometimes it wouldn't.

Q. You made no comment about the matter to anyone on the jury?

A. About the pushing?

Q. Yes.

A. Well, they knew I was pushed.

Q. Did you talk about it to any of them?

A. I come up and I was all excited and I was afraid I was late. They do know on the jury I was pushed.

Q. Did you make any comment about the man in any way?

A. No, I didn't, but Mrs. Ganfield was with me too and I mentioned that he felt as bad about it as I did. Before we got the car parked, he was out of the lot and I think he felt just as bad as I did.

Q. What I am asking, if you characterized him in any way by commenting on his attitude towards you, whether it may have been favorable or unfavorable or whether you made any comment to any individual on the jury.

A. No.

Q. And he never said a word to you?

A. No. If he had said anything I would have felt I should have told but he didn't say anything and it just happened he was in the car that pushed me and that State Policeman was in the back seat, that kind of good-looking slim fellow and we said, well, he would know it was just a case of somebody getting pushed.

Q. There was nothing about the circumstance that would involve you or embarrass you or Mrs. Ganfield in any way?

A. No. It is just unfortunate that he should happen to be the fellow back of me and he never said a word, you see, either, that I felt it was necessary to say anything, just a case of a push.

Q. Of course, you realize how important this trial is both ways and we want to know, of course, that there is—

A. No, it wouldn't make any difference as far as I am concerned.

Q. I am not saying anything to you about it one way or the other, I am just reporting I had the circumstance brought to me.

A. That is the only thing that has ever been that we had come in contact with him and I figured, well, there was nothing said and that it wasn't—you know, being the State Police was in the car, I figured, you know, he could tell it was just—

Q. So long as it was brought home to me, it was my duty to tell you.

A. Well, that is what it is.

Q. So long as there isn't anything about it and you can forget the circumstance—

A. Well, there isn't. Mrs. Ganfield was in the car too.

Q. I don't want you to mention it to any other members of the jury. Let the matter drop then.

A. After that we started to park in this other parking lot because someone else said that they parked in that other lot and he parked next to them. As a matter of fact, that is the only day I parked there because he was pushing me and I suppose pushing me, he pushed me in that lot.

Q. Where does Mrs. Ganfield live?

A. On Ten Mile in Royal Oak. I pick her up every morning and sometimes Mrs. Hopper. Today we came and last Friday, but she doesn't come with me all the time.

Q. They all know about this circumstance?

A. Yes.

Q. But there hasn't been anything said about the individual, I mean by way of characterization against him or for him, because of this circumstance?

A. Absolutely not. I don't know that all of them know but I do know some of them know I got pushed that morning because I was getting awful nervous, you know, about being late, but as far as any different feeling, or anything, there was nothing.

Q. I wouldn't mention it to anybody else, but if anything does occur, even if it is the slightest things, I want you to report it.

A. I wish I had but I figured there was nothing said.

Q. Very well. That is all.

(A few minutes later, Mrs. Latta was again called into the office of Judge Hartrick, and the following occurred):

The Court: Mrs. Latta, I wanted to say one thing more to you, so as to relieve any doubts or apprehensions you may have or suspicions you may have in your mind. There was no State Policeman in this car as you mentioned. These men are at liberty on bail. There is only one man not at liberty, and that is Mr. Davidson, and your assumption that there was a State Policeman is not correct.

Another thing I want to tell you is this. The information I acquired did not come from the prosecution and did not come from the defense. No one in the case has given me the information I am giving you. It came from someone who had been sitting in the court room and I am saying that so you will know that no parties in the case have been advising or bringing this matter up, because I didn't want you, especially under the circumstances, to have any feelings that somebody in the case had been talking or had been criticizing one way or the other. One statement was that there was no one who belonged to the State Police in the car at the time and the information did not come from any member of the State Police nor from the prosecution in the case.

Mrs. Latta: I don't understand. I would have sworn and Mrs. Ganfield, too—I know it was Pete Mahoney and Mike

Selik in the front seat but I would have sworn it was a State Police in uniform in the back seat.

The Court: With that, I will let the matter drop, but I wanted you to know that and I want also, to be sure you haven't made any comment about these men one way or the other to other members of the jury and I wanted to be sure there was no feeling or situation existing on the jury that might be unfavorable to the situation or favorable to the situation.

Mrs. Latta: No, it was just one of those situations that happened.

The Court: I wanted you to know that no one in the case had anything to do with this so you would not be wondering who in the case had been squealing to the Judge.

Mrs. Latta: In my mind, I thought, he has told Kennedy and trying to make something out of it.

The Court: I want you to get that out of your mind, and I say to you now, so you will have it all clear in your mind, it came from someone sitting in the trial, rather than someone in the case. That will be all.

* * * * *

APPENDIX B

Unsolicited Supplemental Charge of the Trial Court (R. 1021-1023)

The Court: We have done the most we can to assist you in regard to your statement. If there are any others you should find necessary, you may request them the same as you have in this instance.

I think, however, in order that you may give each other respectful consideration, not implying you have not done so already, but I think I should give you at least a further instruction that may have some bearing on situations of this kind, which I have given on other occasions where jurors have difficulty in reconciling their differences as to testimony and I should do so at this time.

The Court instructs the jury that the only mode provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case should at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be

produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the people to establish every part of it, beyond a reasonable doubt, and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

Now, I ask you to remember the elements of the case as presented. Go over the testimony as may pertain to the various respondents in this case and try conscientiously and honestly in your own convictions and arrive at a verdict if you can conscientiously do so.

You may retire.

APPENDIX C

The Affidavit of Juror Lulu Grogan (R. 1085-1087)

State of Michigan,
County of Oakland—ss.

Mrs. Lulu Grogan of the City of Pontiac, Oakland County, Michigan, being first duly sworn, deposes and says that she is the same person as Mrs. George Grogan, and that she was one of the members of the jury sworn to hear the State of Michigan v. Harry Fleisher, Mike Selik, William Davidson, Pete Mahoney and Sam Chivas, Respondents, Calendar No. 11268, and render a verdict therein.

Deponent further says that the trial of said matter was completed on Thursday, the 6th day of December, 1945, and that the case was submitted to the jury on said date; that the members of the jury did retire and begin deliberations which actively continued into the following day, December 7th, 1945; that during the afternoon of said latter day, a number of ballots had been taken to determine the status of their deliberation and it appeared then that two members of the jury were of the opinion that the verdict should be one of not guilty for said respondents; that this deponent was one of such jurors of the minority opinion.

Deponent further says that in the discussions between the jurors concerning the guilt or innocence of such respondents, certain parts of the testimony were brought into debate, and that it was at such time the jury requested that certain parts of the testimony concerning that point be read to them; that they were returned to the courtroom and under the court's direction, the court re-

porter read to them a portion of the testimony they had requested; that immediately thereafter, the Court, Honorable George B. Hartrick, informed them that he was giving them further instruction; that he then instructed them concerning minority and majority opinions of the jurors.

Deponent further says that she is not versed in legal language or terms; that she is a housewife and not familiar with technical language; that the only construction she could and did place upon such instruction of the Court, particularly given at that time and without any request of the jury and while they were actively deliberating, was that the jurors of the minority opinion should agree with the majority, regardless of their own reasoning or opinion; that following such instruction, the jury retired again to the jury room, where she was told by the foreman and others that the Court meant she had to conform to the majority opinion; that she had personally so interpreted the court's instruction, hence she and the other juror in the minority consented to a verdict of guilty without any further discussion or completion of previous deliberations, and despite her own conviction and opinion that the respondents were not guilty as charged; that she did join in the verdict solely because she thought the Court so instructed under the circumstances, and not because she thought respondents guilty; that, as a matter of fact, she was of the honest conviction at that time and at all times, that the respondents were not guilty of the crime charged and the verdict of guilty rendered was not in accord with her personal conviction.

Deponent further says that previous to such time above described and during deliberations, one Margaret C. Norton, one of the members of the jury made certain statements to the jury, which were confirmed by the foreman,

Robert Callow, that they had been informed by the Court officer, Mr. Newton, that the Court was very provoked with the jury because they had not arrived at a verdict before then and were taking so much time in their deliberations and ought to hurry up with their verdict.

Further this deponent says not.

Lulu Grogan

Subscribed and sworn to before me, a Notary Public, this 6th day of July, A. D. 1946.

Gloria M. Amantea,
Notary Public, Oakland County, Michigan.
My commission expires 1-23-48.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 685

PETE MAHONEY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

Brief Opposing Petition for Certiorari

Stephen J. Roth
Attorney General for the State of Michigan

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Solicitor General of the State of Michigan

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Subject Index of Matter in Brief

Table of Cases

Statutes

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I

Opinions of Court Below.[*]

The opinion of the court below is officially reported as *People v. Fleisher, et al.* (including Mahoney), 322 Mich. (adv. sheets, Nov. 9, 1948) 474, unofficially, 34 N.W. 2d 15. The connected case referred to in the opinion and in counsel's brief, p. 17, is officially reported as People v. Chivas, 322 Mich. 384, and unofficially in 34 N.W. 2d 22.

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record.

II

Counter-Statement on Jurisdiction.

We accept the statement, petition, p. 15, that jurisdiction of this Court is invoked under 28 U.S.C., Revised, § 1257, and that all necessary steps were taken within the time provided by law.

It is our position, however, (1) that certain questions presented to the Court in the petition, and in the brief of the petitioner, were not presented in their federal aspect; (2) that the court below decided no federal questions, substantial or otherwise; (3) that the court below rested decision on adequate and independent non-federal grounds; and (4) that no federal question presented by the petition for certiorari, possesses substance.

III

Counter-Statement of the Case

Since petitioner's statement of the case is, in our opinion, argumentative, relating the facts most favorable to him, we cannot accept such a summary of the 3-volume printed record. We, therefore, supply the following abstract of the testimony, taken from our brief in the court below.[1]

Such abstract of the testimony includes: (1) a broad outline of the State's theory of the facts, derived from the

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[1] It should be noted that none of the defendants moved for a directed verdict, and none contended that the verdict of the jury was against the great weight of the evidence.

trial court's charge to the jury; (2) a brief synopsis of the testimony which the people contends supports such a theory;[2] (3) the theory of the defense which was, of course, rejected by the jury; and (4) a short summary of the testimony offered in support of the defense theory.

1

The People's theory, accepted by jury in resolving issues of fact.

As carefully explained by the trial judge in his charge to the jury when stating (996-1001) the theory of the prosecution, the essential ingredients of the story accepted by the jury are substantially these:[2]

The defendants Fleisher, Selik and Mahoney were concerned in procuring an interest in the gambling establishment at 69½ South Saginaw Street in the city of Pontiac which was conducted by one James Dades (150-167) as the Club Aristocrat, and which they proposed to acquire through the procedure dubbed by the underworld as 'muscling in' and in furtherance of such a scheme Fleisher and Selik had conceived the plan of robbing the proprietor and owner (996).

Mike Selik, who worked in O'Larry's Bar in Detroit, had while in state prison become acquainted with Sam Abramowitz, a witness in this case,[3] and after their release Selik

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[2] In such summary (and those which follow) we shall endeavor to eliminate all unessential details.

[3] For his testimony, see record (346-371; 378-457; 470-512; 539-546).

and Abramowitz (the witness), the defendants Fleisher and Mahoney, and another witness, Henry Luks,[4] met on several occasions in O'Larry's Bar (996).

Luks, who was a state prisoner on parole, worked in Lansing; Abramowitz, also on parole, lived in Flint; but each of them, from time to time, would frequent O'Larry's Bar, in Detroit, where they met the defendants Fleisher, Selik and Mahoney (997).

During the latter part of November 1944, Selik requested Luks to come to Detroit because he had something for him to do, and on or about the 28th of that month Selik wired Abramowitz at Flint, requesting him to come to Detroit on Friday (Dec. 1, 1944), stating that it was important (997).[5]

On Friday, December 1, 1944, Abramowitz met Fleisher and Selik at O'Larry's Bar, Detroit, where they informed him they wished him to participate with them and others in the robbery of a place in Pontiac; and these three men, Selik, Fleisher and Abramowitz then drove to a cardroom operated by Mahoney on Woodward avenue near the Vernor Highway, where they met Luks, Mahoney, and the defendants Chivas and Davidson. And it was then and there agreed between them (Fleisher, Selik, Mahoney, Davidson and Chivas, defendants, and Abramowitz and Luks, witnesses and accomplices) that the parties would drive to Pontitc that night for the purpose of robbing the place discussed and agreed upon (997).

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[4]

See Luks' testimony (167-235).

[5]

For brevity in this summary of the State's theory, we use the last names of the parties concerned.

Pursuant to such agreement, the parties drove to O'Larry's Bar, picked up the gun or guns, and in two automobiles proceeded to Pontiac, arriving there in the early hours of Saturday, December 2, 1944, when the defendant Chivas went into Dade's place and in a few minutes reported to certain of the other defendants concerning the amount of 'play' going on in the gambling establishment (998).

In accordance with an understanding between the parties to the transaction, certain of them synchronized their watches, it being agreed that Chivas was to return to the Dades establishment, wait exactly 5 minutes, and then leave the place, whereupon Davidson, Abramowitz and Luks would gain entrance and rob the individuals who were playing cards or gambling (998).

Meanwhile, Abramowitz obtained three guns from the defendant Mahoney, who had brought them from Detroit, and who was parked across the street from the gambling establishment, gave one to Luks and one to Davidson, (987, 998).

Later, Luks, Abramowitz and Davidson went to the front door of the Dades place, rang the bell, but were not allowed to enter. Davidson was recognized by one James Pruzor (285-316), who told the rest of the occupants not to let the men in; so, after a short time Abramowitz, Luks and Davidson left, going down the stairway leading to the street. One of the Dades' place frequenters, thinking he recognized some of the parties, left the establishment (998), and went down to the sidewalk in front of the stairway, where he was struck over the head with a gun by Davidson.[6] Whereupon,

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[6]

The man so assaulted was Philip Criss who testified (236-249) concerning the affray, but who recognized only the defendant Chivas. Other witnesses, esp., Abramowitz and Luks, testified concerning the remaining details.

Luks and Davidson marched the witness Criss up the stairway, and one of the occupants opened the door, allowing Luks and Criss to enter, but they shut it before Davidson got in. Luks, gun in hand, then informed the occupants that it was a 'holdup' and he proceeded to rob certain of them of their money, taking upwards of $270 from the proprietor, James Dades (999).

Shortly after the entrance of Luks and Criss into the gambling establishment Abramowitz, who in the interval had attended the outside door, returned upstairs, found Davidson in the hallway in front of the upper door, and with his gun broke the door glass, thus permitting Davidson to enter the place and who while armed with a revolver participated in the robbery (999).

In breaking the glass, Abramowitz cut both his wrists and, bleeding freely, ran downstairs and got in the rear seat of an automobile (belonging to one Martin Eisner) which had been driven to Pontiac by Fleisher and in which he and Selik were then seated. Abramowitz remained in this car long enough to leave blood stains on the floor of the rear seat of the vehicle, and Fleisher and Selik told him to go to Pete's (Mahoney's) car so Mahoney could take him to a doctor. Accepting such advice, Abramowitz got in the car with Mahoney and they started for a doctor (999).

Unable to find a physician in Pontiac, and while driving to Detroit, Mahoney and Abramowitz decided to go to Harper Hospital in that city, concocting the story (to be told hospital authorities) that Abramowitz had been injured when attacked by some colored people. Upon arrival at the hospital, Abramowitz told his story and was treated by a physician who took several stitches in his wrists, the scars of which he bore when he testified (1000).

Fleisher, Selik, Davidson (defendants) and Luks (the witness) left Pontiac shortly after the robbery, drove to Fleisher's home, took care of the guns (with the exception of that used by Abramowitz), and then Selik and Davidson, accompanied by Luks, went from Fleisher's home to a restaurant on Dexter Bouevard where they counted the money taken in the robbery, and from there went to Greenfield's restaurant. While there, Selik phoned the defendant Mahoney at his apartment, and shortly thereafter Mahoney and Chivas came to Greenfield's (1000).

In dividing the money Davidson requested and received $150.00; and it was agreed that Chivas should have a like amount (1000-1001).

Selik and Mahoney then went to Harper Hospital and brought Abramowitz to Greenfield's restaurant where they remained a few minutes during which Abramowitz being weak drank a couple of glasses of milk. There the parties split up; Mike Selik took Abramowitz and Luks to his apartment, where Luks remained until the following day, Abramowitz staying until sometime the following Monday (1001).

Luks received approximately $170.00 as his share of the avails of the robbery, while Abramowitz received a similar amount (1001).

Luks and Abramowitz were called before the grand jury being conducted by Circuit Judge Doty in Oakland county, and each of them was granted immunity concerning their answers relating to the facts in this case (1001).[7]

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[7]

Code of Criminal Procedure, chap. 7, § 6; 3 Comp. Laws 1929, § 17220; Stat. Ann. § 28.946.

2

Synopsis of testimony supporting theory of people accepted by the jury.

Witnesses for the prosecution fall readily into three groups: (a) those accomplices who related the entire transaction from its instigation to its close;[8] (b) those who corroborated the testimony of such accomplices;[9] and (c) those 'eye-witnesses' who were present at the Club Aristocrat when the event occurred.[10]

(a) Testimony of Accomplices:

Henry Luks, a 29-year-old recidivist, after relating his antecedents (167-168), first told of his friendship and association with Selik and his acquaintance with the other defendants, Fleisher, Mahoney, Chivas and Davidson, the group that frequented O'Larry's Bar and Mahoney's place on Woodward avenue (168-170).

He testified in substance (169-189) that the last part of November or the first part of December 1944, on a Friday, in response to a telephone call from Selik, he went from Lansing to Detroit by rail, and arrived at Mahoney's place on

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[8]
Henry Luks (167-235); Sam Abramowitz (346-371; 378-457; 539-546).

[9]
Martin Eisner (316-329); Abe Messenger (329-331); Gabriel Cohen (331-339); and Joseph A. Lutz (339-342).

[10]
James Dades (150-167); Philip Criss (236-249); Chris Kocotas (250-261); Harry Polenis (261-270); Louis Armos (270-175); George Glotopolos (275-284); and James Prunor (285-316).

Woodward avenue between 10:00 and 11:00 at night, where, at midnight, he had a conference with Mahoney, Selik, Fleisher, Abramowitz, and Davidson; Chivas was there, though he did not sit at the table and had little to say.

At this conference, the parties laid their plans and agreed to go to Pontiac for the purpose of 'sticking up' some 'gambling house'. They were to go there in two cars; Mahoney was supposed (175) 'to drive the guns down there, and (said the witness) we were supposed to meet him . . . and get the guns and go up and hold up the place and come down, and Harry (Fliesher) and Mike (Selik) were supposed to drive us back to Detroit. I was supposed to go in with one of the guns, and Candy (Davidson) and . . . Abramowitz was also supposed to go in with me. . . . Abramowitz was supposed to stay at the door'. Chivas was supposed to 'leave (let) us in the place'. And Luks revealed further details of the plan, many of which are irrelevant to this review.

He did testify (176), however, that:

> "While we sat there at the table in Pete Mahoney's place, there was something said concerning what car we were to ride up here in. We were to follow in another car, and I did not know at that time what kind of a car it was, and later learned it was a Pontiac and Harry Fleisher was to drive it. It was said that . . . Selik, . . . Abramowitz, the fellow Candy (Davidson) and myself would ride in that car with . . . Fleisher driving . . . ."

After the foregoing conversation, the defendants went to O'Larry's Bar, where they remained until it closed at 2:00 o'clock in the morning (177), when Fleisher, Selik, Davidson (referred to repeatedly as 'Candy'), Abramowitz and

the witness Luks drove to Pontiac and passed the place they were to hold up (177). They then made a U-turn about a half block beyond, and finally parked on the same street on the opposite side across from the place they held up (177-178). Mahoney's car was parked across from them 'about 30 feet going in the opposite direction', and the defendant Chivas came from there to talk with them, sitting in the front seat.

Chivas stated (178) he had been up in the gambling place and, since they had a poor night, there wouldn't be too much money. Fleisher didn't like the idea; Luks favored it; and both Selik and Fleisher said 'it is up to you fellows'; and thereupon those who had watches 'fixed them at the exact time'. The plan was that Chivas was to go up in the gambling place, remain there three or four or five minutes, and when he came out the door, the others were to force their way in and hold up the place (179). There was a doorman there who would not let them in if they were strangers.

This witness (Luks) then proceeded to give the details of the holdup, as heretofore summarized: that Chivas left the car and went across the street; that Abramowitz, Luks and Davidson waited a few minutes, then crossed the street and obtained three guns from Mahoney's car, each receiving one; that Luks, Abramowitz and Davidson went up the stairs, were denied admittance, and (179-180); that Luks finally obtained entrance to the gambling place by sticking his gun in the ribs of a man who had just come out; and that the robbery then proceeded (180).

Shortly after, Luks heard a crash of glass, and Davidson (referred to as 'Candy') entered the place with drawn gun. They stayed about 10 minutes, obtaining money from the people there and from the cash register. During this time,

while they were in the place, Chivas was amongst the customers, holding his hands up and, upon demand of Davidson, lying face down on the floor; and he was still there when Luks walked out the door (182).

When, after the robbery, Luks and Davidson went out and down the stairs, they crossed over to the Pontiac car where they found Selik and Fleisher, and they got into the back seat (181-182), and Selik told them to be careful, that Abramowitz had been seriously cut about the wrists, and that there was blood on the floor (183), but Luks did not observe the blood because it was still dark.

They did not stop until they got to Detroit and Fleisher's home, where they were supposed to leave the guns, and Fleisher left the car; Luks did not see him take the guns, but the witness had handed the guns to the front of the car while they were driving from Pontiac to Detroit. Fleisher returned to the vehicle in a few minutes (183), and they drove either to a cab or directly in the car to a restaurant on Dexter Avenue not very far from O'Larry's Bar. The witness was not sure whether Fleisher drove them, or took them to a cab in which they were conveyed to the restaurant. Be that as it may, 'Candy' (Davidson), Selik and the witness Luks went into the restaurant and, during the half hour they were there, the latter got the money together and counted it, about $800. (184).

After that, these men took a cab to the Greenfield restaurant on Woodward Avenue, and Davidson, Selik and Luks went in 'because (Luks said) we were to meet the other fellows there' (184).

Mahoney and Chivas came to this restaurant later, and there were five of them, Selik, Davidson, Mahoney, Chivas and the witness Luks (185). Then they proceeded to divide

the money: Davidson asked for and received $150, and, after Selik and Mahoney had gone to the hospital and brought back Abramowitz, Chivas was given $150 (185) on order from Mahoney and Selik; and Abramowitz received $170 or $180 (186).

When Abramowitz came into the restaurant with Mahoney and Selik, his arms were bandaged (186). Luks was not sure whether he gave Abramowitz the full sum of $170 or $180 there; it might have been some there, the rest somewhere else (187).

From the Greenfield restaurant, Abramowitz, Selik and Luks went to Selik's apartment and went to bed after staying up a little while and having a drink or two. Luks slept on a couch and Abramowitz slept in a Murphy bed (187). He stayed there until the afternoon of the next day and Abramowitz was still there when he left; he saw him again that night. Selik's wife was around there, and that night was the last the witness saw Abramowitz around the Selik apartment. Then Luks returned to Lansing (188).

Luks testified (188-189) further that prior to the robbery, either at the place on Woodward or in the car, Selik told him that 'the fellow (Dades) had an expensive diamond ring on his finger".

The witness Luks was closely cross-examined by counsel for the defense,[11] especially in relation to the make of car in which he had been driven to the scene of the crime (209, 212-214), and he was called upon to explain certain alleged

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[11]

By counsel for Mahoney (189-193; 225-227), Chivas (193-199), Davidson (200-201), and by the attorney who represented Fleisher and Selik (201-225).

discrepancies in the testimony given by him at the preliminary examination.

Sam Abramowitz (346-371; 378-457; 539-546), 37 years old, a native of Cincinnati but a resident of Detroit since age one, had a 10th grade education, and possessed a prison record (346).

The witness met the defendant **Selik** about 1931 or 1932 while they were imprisoned at Ionia, and they became pretty good friends, renewing their acquaintance in 1944 within a month or so after Selik had been released from Jackson prison (346-347). It might have been the latter part of 1943 when they met at O'Larry's Bar, which Selik was running or managing (347).

From April 1943, when Abramowitz was released on parole and went to live in Flint, until the 2nd day of December 1944, he saw Selik a few dozen times or more, at O'Larry's Bar, at Selik's apartment, and in a little gambling place on 12th Street, Detroit (348).

Abramowitz testified (348-349) he had known **Fleisher** for 20 years, during which they grew up in the same neighborhood, though he did not know him well (other than to say 'hello') until the year 1944 when he saw Fleisher about the same amount of time he saw Selik and at the same places. He really got acquainted with him in October of 1944, and, he stated (349), 'I became better acquainted with him when this robbery happened'.

At about the same time, in October 1944, the witness also became acquainted with the respondent **Mahoney**, and he met the defendant **Chivas** at Mahoney's place on Woodward avenue. He knew Davidson by the name of 'Candy' (349).

During the period of time when Abramowitz lived in Flint, he received a telegram from Selik and shortly after that he arrived in Detroit on Friday night, December 1, (1944), and went to O'Larry's Bar (350) about 10:00 o'clock. Fleisher and Selik came in about 11:00 o'clock and, during a conversation with this witness, stated they wanted him to go to Mahoney's place (351).

When (the three) were outside, said the witness (351),

> "Mike (Selik) spoke up and told me that we could take this Pontiac place off that night or rather . . . the following morning".

No other conversation took place between O'Larry's Bar and Mahoney's place, because when they left they were in Marty Eisner's car 'and Mike's (Selik) wife was along and we didn't talk in front of her' (351). They were trying to catch a cab first and since they could not get one, Selik suggested they go inside and get Eisner's car and get his (Selik's) wife and after they got to Mahoney's place, Mrs. Selik would drive back with the car (351).

At Mahoney's place, Abramowitz met Chivas, Luks and Mahoney, as well as Candy Davidson, who arrived 20 or 30 minutes later in response to a telephone call and who was introduced to them as an out-of-town boy (352-353).

This witness then testified in relation to the conversation had by the defendants and the witnesses around a table in the Mahoney establishment during which they formulated plans for robbing the gambling place at Pontiac (355-358), and he told of further conferences on the subject held later in the morning at O'Larry's Bar. During such talk, Selik said (351) that he and Fleisher and Mahoney wanted

"to get a piece of the place (at Pontiac) and take it over. We were (said Abramowitz) going to hold up the place and what money was there we would keep, they (Selik, Fleisher and Mahoney) didn't want any part of the money, they just wanted the place".

Like Luks, Abramowitz also told of the trip the parties made to Pontiac in the Eisner car, starting out from O'Larry's Bar around 2:30 in the morning of December 2, 1944, and how Fleisher drove with Selik who sat in front beside him while Davidson, Luks and Abramowitz occupied the rear reat. He did not see Chivas and Mahoney again until they arrived in Pontiac (358-359).

And he testified in detail concerning the robbery and the part he played (359-364), including the cuts he received on his wrists while opening the door into the gambling place (362-363).

Abramowitz related how, after cutting his wrists on the glass of the upper door, he returned downstairs to the Eisner car and got in the rear seat and talked with Fleisher and Selik who still sat in front. While there, he bled profusely on the front of the back seat and possibly some on the back of the front seat, because he was leaning up that way and telling them to take him to a doctor. Selik, however, told him to run ahead to Mahoney's car and have him take him to a doctor, and they, Fleisher and Selik, could wait and take the boys back (363). And the witness displayed to the jury the scars on his wrists (363-364).

When Abramowitz got into Mahoney's car, they decided to drive to one of the hospitals in Detroit, and as they drove along they determined on Harper Hospital in that city (364), and planned the story they would tell, having in mind that in every emergency case that comes into Detroit

hospitals, the police are called (365). Knowing that on one side of Harper Hospital was a colored neighborhood, they decided that Abramowitz would go in that entrance and tell the authorities in charge that he had been cut by a couple of colored men that were trying to rob him. And that is the story that he told when he got inside (365-366).

After being treated in the emergency and operating rooms by Dr. Anderson and others, Abramowitz, when he got downstairs, saw Selik and Mahoney standing near the cashier, paying his bill. The three men then got a cab and went up Woodward avenue to Greenfield's cafeteria where they found Chivas and Luks. Candy (Davidson) was not there, and Selik told Abramowitz that Candy had taken his part of the money and gone (366). As they got to Greenfield's restaurant, Selik, Mahoney and Chivas were there with Luks, but Fleisher was not present. The men were sitting at a table when he arrived, and one time Selik said to him that he had his (Abramowitz's) share of the money and he would give it to him. Abramowitz said O.K., and he didn't take the money until the next day (367). He had two glasses of milk, and then they split up.

While at Greenfield's, the conversation was that Abramowitz was going to Selik's apartment and stay there for a day or two, 'which was suggested by Mike Selik' (367).

In accordance with that arrangement, Selik and Luks, Abramowitz and Mahoney left the restaurant in a taxi cab; they let Mahoney off at the corner of Woodward and Alexandria, and then went to Selik's apartment on Boston Boulevard (consisting of a bedroom, living room, kitchen and bathroom). Luks, Selik and Abramowitz went in together, and the witness slept on the Murphy bed, while Luks slept on the couch (367).

Abramowitz was not certain of the time of arrival at Selik's apartment, but he thought it was around 6:00 o'clock in the morning. He first saw Selik's wife around there when he came in (367).

The witness also testified (369) he remained in the Selik apartment from Saturday morning until about noon Monday. Selik's wife and a girl from Chuck Selik's bar took care of him and looked after him. Luks stayed there that one night and left some time during Saturday.[12]

Abramowitz recalled (369) a man named Eisner coming to the Selik apartment Saturday or Sunday, he thought Saturday, and asked him how he felt; and 'there was a fellow in the kitchen they call Lindy'. He had known him for years but did not know until he saw it in the papers, that Lindy's last name was Niskar. Niskar was there all afternoon, taking bets on a telephone extension which they had there for a bookie. Abramowitz had seen him around the apartment before doing the same thing. Eisner went into the kitchen and talked with Lindy Niskar (369-370), but he didn't know what they were saying.

Abramowitz finally left Monday night and returned to Flint, and was eventually picked up by the police in March 1945 and taken to the jail at Mason in Ingham county (370) where he was kept until the trial (371).

Recalled, the witness testified (378) that on or about the 28th day of November 1944, while he was at Flint, he

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[12]

It is important to compare this testimony with that of Selik (779), and both with the allegations in the affidavit of Mrs. Selik (1066-1067) which was filed in support of the motion for new trial on behalf of Fleisher and Selik.

received a telegram signed 'Mike' (Selik) which told him (383) it was very important for (Selik) to see him Friday night, and it said (384) to come to Detroit Friday night.

The witness was then cross-examined by counsel for Chivas (384-396) and Davidson (396-397).[13]

On cross-examination by counsel for Mahoney (396-408, Vol. I), Abramowitz testified it was around 12:00 midnight when the defendants left O'Larry's Bar, Detroit, so they must have been in that place two hours (398). During that time he talked with Selik and Fleisher about 10 or 15 minutes (399).

On cross-examination by Mahoney's counsel (396-408, Vol. I), Abramowitz testified it was around midnight or a few minutes after that they left O'Larry's Bar to go to Mahoney's place, Detroit, so they must have been in the former place two hours (398) during which he talked with Fleisher and Selik about 10 or 15 minutes (399). While waiting for a cab, Abramowitz had a conversation with Selik, as the result of which Mike Selik and his wife, Fleisher and Abramowitz drove to Mahoney's place.

Counsel questioned the witness closely concerning Mahoney's participation in the conference at the table in his place, bringing out the fact that Mahoney spent most of his time attending to his gambling business and selling whiskey (400); Mahoney merely came to that table for a minute or so on a couple of occasions, 'up until the last time'. They did not really discuss the proposed robbery until they were

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[13]
Since Chivas appealed on a separate record, and since we received no brief from counsel for Davidson, such cross-examination is not set forth in full.

all there, except Chivas, then they sat there about 10 minutes talking about it. 'I mean', he said, 'Pete Mahoney sat at that table about 10 minutes, and that constituted our discussion regarding the whole matter, and how it was to be pulled' (401).

Pete Mahoney had a red two-door Oldsmobile coach (401) which he drove to Pontiac later that following morning (402).

Seven of them drove in the same car from Mahoney's place to O'Larry's Bar at 1:30 in the morning. Henry Luks was one of the seven men (402), though if Luks stated there were five men in one car and two in another, either witness could be mistaken (402-403). But he was pretty certain there were seven since he thought he sat on somebody's lap.

Abramowitz's acquaintance with Mahoney began around October 1944 and in the interval between then and the 1st day of December they merely 'passed the time of day' several times when they met casually (403).

When they arrived in Pontiac, the witness was certain, that second car was parked on the west side of the street when Abramowitz went to it to get guns. Then he went immediately across the street. And immediately after he broke the glass in the door, he came downstairs right away (404-405). He did not know how much time elapsed but he thought about 12 minutes. He got in the car and was there just a few seconds. The bad cut on the inside of his wrist was bleeding very badly (405).

Abramowitz stated he then got out and went up ahead and got into Mahoney's car which had been pulled up in front on the same side of the street while he was upstairs. He

could not estimate the distance it was from the building entrance, might have been 100 or 500 or 1,000 feet (406).

When he got in Mahoney's car he stated to him his wrists were bleeding, and they bled all the way to the hospital, so the blood went down on the car, either on the front seat or in the front of the car and all through his clothes (406).

And counsel for Mahoney further examined the witness on the subject of his trip to the hospital (406-408), and in relation to his criminal record.

Cross-examined by counsel for Fleisher-Selik. (Vol. II. 409-451), Abramowitz testified (409-413) that although he had stated at the preliminary examination conducted by Circuit Judge Doty in the same court room, that an attorney, Theodore J. Rodgers, had swindled him out of $500, the accusation was false because, his recollection having been refreshed after being questioned by Lyle Morse, a state police officer, he remembered that the lawyer's name was Robbins, and not Rodgers.

He was also closely examined on the subject of his parole in 1943 (414-415), the terms thereof and the consequences flowing from its violation (449) and the penalty exacted by law for the offense of robbery, armed (450).

He admitted he had had opportunity to talk with the witness Luks about his testimony, but he denied that he had (417).

Abramowitz also admitted (417-420) he had been taken to Dades' place at Pontiac to check-up on the place, and counsel questioned him closely on a discrepency in his testimony with respect to the number of doors there, whether 3 or 4.

The witness denied (420-421) he knew Polenis (an eye-witness, see 261-270 and 547-550); it was possible he answered (421), that since his arrest in March 1945 Harry Polenis had been brought to his presence by an officer who said 'This is Harry Polenis, do you know him', but he did not recall the event. His memory was not good.

Under such examination, he retraced the course of events on Dec. 1 and 2, 1944, the use of Eisner's car (422), and his knowledge of Hyman Niskar, who, he said, was in O'Larry's Bar that night. He restated facts relating to the plans laid for the robbery (423-425) and the methods pursued in carrying them out (426-427).

He also explained the duties of a door-man during a robbery (428), the position to which he was assigned that night (429), and he again stated that Fleisher, Selik and Mahoney were waiting in cars out in front (429).

The witness was closely questioned about a car he saw or heard on the street below while he was on the stairs (430-433).

Counsel then examined the witness about the arrangement made by the defendants that night at Mahoney's place, about splitting the expected $15,000 or $30,000 they hoped to realize from the robbery, and he testified that Fleisher, Selik and Mahoney did not want any share, the reason being that they were 'trying to muscle in on the place' (434-437).

The witness again related the events which occurred after cutting his hand and wrists on the door of the Dades' place (441-442), the trip to the Detroit hospital; and in that connection he was asked to explain why he and Mahoney, although anxious to obtain medical attention, did

not stop at other hospitals along the route, the answer being that they did not wish to risk investigation in Oakland county or in Highland Park (441-444).

At the Harper hospital, two police officers questioned Abramowitz, who told them the story he had concocted with Mahoney (445).

When he came out he was surprised to find Mahoney and Selik waiting for him; he didn't find Luks there but saw him later when the three men drove to Greenfield's restaurant.

And counsel examined the witness regarding the trip to Selik's home and his stay there (447-448).

On re-direct examination (451-454), Abramowitz testified (451) that after he had received the injury, Selik agreed that he would be paid $10 a day until he was able to go back to work. Thereafter he received from Selik, Fleisher and Mahoney sums of money amounting to $300 or $400 altogether (452).

The witness testified he knew of the proposed hold-up job prior to receipt of the telegram from Selik (452), learning of it two or three weeks earlier at O'Larry's Bar when Selik told him he had a place in Pontiac and that just as soon as it was set up right Henry (Luks) and Abramowitz were going to pull it (453).

The conversation about Fleisher, Selik and Mahoney 'muscling in' took place first in front of O'Larry's Bar, and second at Mahoney's place (453).

Further cross-examination (470-489): After the State had rested (467), Abramowitz was recalled and cross-examined

further by counsel for Fleisher and Selik, first (473-474), in regard to a statement that the witness made to the prosecuting attorney of Jackson county,[14] and second (475-483), concerning the gambler Hyman Niskar.[15]

And he was also questioned (484-489) concerning certain events which followed his arrest in March 1945.

(b) Corroborative Testimony:

Luks and Abramowitz were corroborated in the manner following (stated here in summary fashion):

Martin Eisner (316-329), owner of the car said to have been loaned to Niskar the night of December 1, 1944, and which Luks and Abramowitz said was used in connection with the robbery, testified that the car was returned to him the following morning, Dec. 2, 1944, and that he found blood stains on its floor.

Abe Messenger (329-331), a lawyer, testified he represented Eisner in a cause pending in the district court of the United States at Detroit, and though he could not remember the exact or many of the exact details (he was a reluctant witness, obviously), he did recall that on one occasion Eisner picked up another attorney and himself

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[14]

The admissibility in evidence of this statement is involved in Question 11, Fleisher-Selik brief, pp. 45-53. See Group IV, Question 2, this brief. We regret the necessity for breaking the numerical sequence of the footnotes, skipping from footnote 48 to this, footnote 52.

[15]

Involved in questions set forth under Group IV, this brief, based on court's refusal to compel State to endorse Niskar's name.

to take them downtown; and that on this particular occasion he heard someone, when getting out of the car, making the remark: (Who the hell had a miscarriage here', but he did not himself see any stains (330).

Gabriel Cohen, the other lawyer, testified (331-339), with the characteristic caution of a member of his profession, that on the occasion mentioned in Mr. Messenger's testimony, *supra*, that something was there on the floor of the car finally caused him to use the expression above recorded (338-339).

Joseph A. Lutz (339-342), an orderly in Harper Hospital, testified he remembered that on the morning of December 2, 1944, a man by the name of Abramowitz was brought into the hospital, and he identified him as the defendant by that name. He saw Dr. Walter Anderson sew up the arm of Abramowitz. This was between 3:00 and 4:00 in the morning, though it might have been later; and he also saw Selik and Mahoney there (341).

Doctor Donald A. Anderson (457-469), on night duty as an interne in Harper Hospital on December 2, 1944, testified concerning the condition in which he found the respondent Abramowitz when he came to the hospital that morning; and he related the treatment administered when he sewed up the wounds on the patient's wrists. Abramowitz, he testified (459-460), stated he had been taken into a car and a robbery was attempted by two colored men and that he became excited and fought his way free, and he received these cuts, whether they were from knives or glass, he wasn't sure. He left the hospital at 6:20 a.m. (460).

(c) Witnesses at scene of crime:

Several witnesses who were present in the Dades gambling establishment during the night and morning of Dec. 1st and 2nd, 1944, were called by the prosecuting attorney as 'eye-witnesses':

James Dades (150-167), proprietor of the Club Aristocrat at 69½ South Saginaw, in the city of Pontiac, testified he had previously been acquainted with Mahoney, Chivas, Fleisher, and Mike Selik, and he told of their visit to his club rooms a few weeks before the crime was committed. On that occasion, he said (153-155), these men asked him for a contribution for a brother of Fleisher to aid him in his appeal from a criminal conviction. He offered them $500 cash and a diamond ring, but the offer was rejected.

And he gave his version of how the robbery was perpetrated, though he was somewhat hazy on the matter of identification (155-167).

Philip Criss (236-249), a patron of the Dades establishment, recalled the occasion, though he did not remember the precise date; and he recounted how the robbery took place, but he recognized only the respondent Chivas as being present.

Chris Kocotas (250-261) was an employee in the Dades' Club Aristocrat (250). He told of the events of that night; he identified Luks (251), was not exactly sure of Abramowicz (252), was certain he saw Chivas (252 et seq.), and he told of the defendants' previous visit to the club (253). Recalled (625-627) as a witness for Davidson, he said he never saw the man any place in his life; and he testified he was on the floor when the three men came in.

Henry Polenis (261-270), a hanger-on about the Dades' Club, a man with a criminal record, was present there the night of Dec. 1-2, 1944, and at 3:00 a.m. He saw Chivas, but not the others (266).[16]

Louis Armos (270-275), an occasional visitor at Dades' Club, testified he was there about 1:30 a.m. December 1, 1944 (270), and he told of Chivas' connection with the matter (271-272) but he failed to recognize Luks (272).

George Giotopoulas (275-284), a bartender at the Lion Cafe, who gambled at Dades' place, was there the fore part of December 1944; he identified Luks as one of the robbers, and he told of Chivas' connection with the transaction.

James Pruzor (285-316) testified he came to Pontiac from Detroit in 1936. Present in the Dades place the morning of December 3, 1944, from 3:00 o'clock on, he witnessed the robbery which occurred about 3:30 a.m., he identified Chivas and told of his connection with the affair, and he recognized Luks and 'Candy' Davidson (285-290). He was cross-examined on his antecedents (291-295), on his memory, concerning previous meetings with Davidson (296-297), and in regard to his previous record (299-305).

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[16]

This was the witness who, with canny foresight, saved his $1400 by hiding in the toilet and locking himself in.

3

Theory of defendants, as explained in court's charge to jury (993-1023):

Harry Fleisher:

As explained by the court when instructing the jury (1003-1004), the theory of defendant Fleisher, based on his plea of not guilty and testimony adduced in his behalf, was that he first met the defendant Selik and became his friend in the early part of 1944; that for two years last past he had been a very close friend of Mahoney; that he first met Abramowitz and Luks in the fall of 1944; and that his acquaintance with Chivas was only casual.

Although he had been engaged in bootlegging during the prohibition era (1916-1932), although after repeal he continued illegally to distill alcohol, and although he had gambled, he was not a robber or a man who attempted to 'muscle in' on anyone. And he had at no time or place entered into any unlawful agreement with Abramowitz and Luks to commit a robbery in the city of Pontiac.

Fleisher also denied he had anything to do with the crime charge in the information, and he claimed the matter was first called to his attention after his arrest in connection with the Hooper murder case on April 20, 1945.

He admitted he had heard of Abramowitz being hurt, but he said he had no occasion to remember particularly his whereabouts on the night of December 1 or the early morning of December 2, 1944, especially after the passage of some five months or more; and that usually on Friday nights he was at home for his family dinner.

Fleisher made no claim, however, that he positively remembered that night or his exact whereabouts, and he stated that that was reasonable considering the fact that nothing occurred on that night, as far as he was concerned, which would cause him to remember it any more than any other Friday or Saturday night, except that was his best recollection that he learned of Sam Abramowitz being inured on Saturday, December 2nd, 1944, but he had no idea or knowledge that his injury occurred by reason of any unlawful act.

This defendant further claimed that even though he were engaged in the gambling business with Mahoney for the past two years, such association was merely that of a friend and gambler, and he was not guilty of the charge made against him.

Myron Selik:

It was the claim of defendant Selik (1004-1007) that he was not guilty of the charge against him; and that he at no time or place entered into an unlawful agreement to commit the crime charged in the information.

He admitted several convictions of felony and misdemeanor, but urged he had paid the full penalty for robbery, armed, and unlawfully driving away an automobile without intent of steal.

After his release from prison on December 3rd, 1943, he was employed by his brother Charles in his saloon at Dexter and Boston boulevards, Detroit, until his arrest on April 20, 1945.

On August 24, 1944, he married his wife and was still living with her.

He admitted that he had, in his free hours, three or four days a week, gambled in a club on 12th street, but he contended that by this fact he could not now be condemned.

He also admitted that he was, on July 31, 1945, convicted of the crime of conspiracy to kill and murder Warren G. Hooper, from which conviction he had appealed.

Selik denied he ever had any agreement with Luks and Abramowitz, or anyone else, to have Luks and Abramowitz and others commit the hold-up in this case, and he denied any participation in or knowledge thereof, professing that his only connection with the case was when he was called by Luks at an early hour on the morning of Saturday, Dec. 2, and advised by Luks that Abramowitz was hurt and in Harper hospital and needed help.

Thereupon, he claimed, he told Luks to meet him in Greenfield's restaurant; and that, after dressing, he immediately proceeded there and met Luks, who informed him that Abramowitz was in the hospital by reason of some altercation with negroes.

He testified that he thereupon called the Harper hospital and was informed, upon his inquiry, that within a short time Abramowitz would be able to be removed from that institution; that he called his personal physician and Pete Mahoney, informing the latter of the circumstances and requesting him to get a room in the Strathmore hotel where the injured friend could be taken.

Shortly thereafter Mahoney appeared at the Greenfield restaurant, in company with him, Selik, without any knowledge whatever of the crime Luks and Abramowitz had committed, left Luks in the restaurant and went forth in a cab to Harper hospital, a short distance away. After a short

wait, Abramowitz came out of the elevator, the fee due was paid for service rendered him, and a tip was given to the orderly, Lutz.

Abramowitz was apparently in a weakened condition, his hands were bandaged; and Selik and Mahoney thereupon took Abramowitz to Greenfield's restaurant and attempted to aid him in regaining some strength by feeding him milk.

It became apparent to Selik (he claimed) that Abramowitz, by reason of his weakened condition, could not and should not be left alone in a hotel room; and he claimed that he took Abramowitz to his home and repaid in kind the treatment he received from Abramowitz when he himself was accidently injured in Chicago in 1936.

After Abramowitz was taken to Selik's apartment along with Luks, he was attended by Selik's wife, Naomi, until some time Monday (December 4th).

At no time while Abramowitz was in Selik's apartment did the latter have any knowledge that Abramowitz had received him injuries other than as Abramowitz had related to him; he claimed he had absolutely no knowledge that Abramowitz had participated in a robbery, or that he had on his person between $150 and $170, but admitted he gave Abramowitz $50 as a loan for medical expenses. And he claimed he most certainly would not have given him the money had he known Abramowitz had $150 or more in his pocket.

Pete Mahoney:

It was the claim of Pete Mahoney (1002-1003) that he was innocent of the crime charged against him and that he had no knowledge of, nor participation in the robbery of

the Aristocrat Club, and that the charge against him had not been established by the evidence.

Mahoney further claimed that, to the best of his knowledge, neither Luks nor Abramowitz were ever in his place at 2423 Woodward avenue, Detroit; that none of the defendants was there during the evening of December 1, 1944, and that he has never met with anyone or participated in any plans or discussions concerning the commission of any crime or violence on December 1, 1944, or on any other date.

It was his further claim that on the night of December 1, 1944, he was busy at his place of business on Woodward avenue, Detroit, until about 2:30 a.m. the following day, and he had not been away from there that night. He then went downstairs to the Hi-Wood restaurant and, after eating, proceeded to his residence at the Strathmore hotel where he retired and remained. And he claimed that he received a call from Mike Selik about 5:30 a.m., December 2, 1944.

And it was further the claim of Mahoney that he was not in Pontiac at any time after the visit to the Dades place on or about October 15, 1944, until he heard that a warrant had been issued in this cause.

William W. Davidson:

It was the claim of the respondent Davidson (1002) that he was not guilty of the crime charged against him, and that the evidence did not establish such guilt. He did not take the stand in his own behalf.

4

Testimony for Defense

In behalf of Fleisher-Selik:

Both Harry Fleisher (703-749) and Myron ('Mike') Selik (766-807) took the stand, each testifying in his own behalf to facts which, if believed, would sustain his theory as set forth in part '3', *ante*, and maintain his innocence. It need not be repeated here.

Other witnesses were called by their counsel and testified in substance as follows:

Joseph Marlow (695-703), a Detroit police patrolman assigned to the 13th precinct station on East Canfield between Woodward and John R., while on scout car duty the night of December 1-2, 1944, testified (695) that the district around Harper hospital, east of Woodward past John R Street and for over a mile or a mile-and-a-half east, and north and south for miles, is a solid colored district.

He testified (696-698) that early in the morning of December 2, 1944, he was called to Harper hospital where he saw Sam Abramowitz and investigated his injuries. Abramowitz told him he had been held up on Elliott street by a couple of colored fellows who came along and had attempted to rob him in the car; that a battle started and he broke the glass in the car and jumped out of the door of the car; and that he got his injury from the glass when he broke the door. The story sounded logical to him because of his experience in examining such people while investigating. 'You get to know when fellows are telling the truth and you can put things together and you can see whether he is lying or not' (608).

From his story, Abramowitz was walking on Elliott between John R and Brush which is a colored neighborhood. An occurrence of the kind reported by him is definitely not unusual. It happens very often down there.

On cross-examination, the witness testified (699-700) that Abramowitz told him the attempted robbery occurred at 4:15 a.m.; that Abramowitz also stated that during the fight with the colored men he was cut with a knife on his right and left arms (699), and that he could give no description of his assailants (700).

On re-direct and further cross-examination (701-703), the witness testified that if he had not believed Abramowitz the officers would have communicated with the detective bureau and there would have been further investigation. But because that type of thing happens in this particular district so frequently, he just concluded 'well' here is just another one of those cases' (701). It was very common and there was nothing unusual that caused him to suspect Abramowitz because he didn't know the name of the man who picked him up. He guessed it was a good story (702).

Orie Barry (750), an employee of the Greenfield restaurant, where the wounded Abramowitz was brought by his friends during the early morning hours of December 2, 1944, testified to the seating capacity of the restaurant, its schedule of service, and the number of people served that morning.

In behalf of Mahoney:

Pete Mahoney (534-538; 550-572; 576-617) testified at length in his own behalf in substantiation of the theory set forth in part '3', *ante*, and to facts which if believed by the jury would have led to his acquittal.

Other witnesses were examined, of course, and parts of their testimony (having little to do with the facts of the case itself) bearing on the whereabouts of Hyman Niskar, or in relation to other facts relevant to the questions involved, will be considered in argument.

In behalf of Davidson:

Davidson did not take the stand in his own behalf, but he added testimony in the nature of an alibi.

Olivia Ann Davidson (617-625), his wife, after reciting their antecedents (617-618), testified in substance that around October 1, 1944, they registered in the Strathmore hotel, Detroit, and stayed there one night; then they moved in with some friends and lived at 3703 14th street in that city.

During October, November and December 1944 her husband, the respondent Davidson was incapacitated with a left broken ankle, and was unable to walk around without the help of artificial means; he was on crutches quite a while and then used a cane; and he remained in that condition during those three months until they left Detroit in January, went to Toledo, stayed there two or three days, visited several other cities and arrived in California the first part of July 1945. They lived there under the name of Daniels (619).

She was in California when her husband was arrested. He did nothing to conceal himself; and in packing his clothes on numerous occasions she had never seen a pistol in his possession or belongings, nor had she ever seen him with a pistol.

On cross-examination (619-625) the witness was closely questioned in relation to her husband's gambling activities and their journeys about the country; and she admitted at its close (625) that Davidson had never done a day's work other than gambling 'because that is about the only thing he does'.

Dr. Simpson W. Green (627-631) testified to the effect that Davidson had visited his office on October 10, 1944; that he had an injury to his left ankle which was enormously swollen, and he carried a cane. The witness sent him to Dr. Blodgett for an X-ray but he never saw the plates.

Dr. William W. Blodgett (632-650) testified Davidson came to his office in the Kales building, Detroit, October 12, 1944; his left ankle was swollen and restricted in motion but in fairly good relation to the leg (633), and the witness proceeded to read from his notes describing its conditions

Davidson, he said, was to return in two days for re-strapping of the ankle, but he failed to do so and the doctor's office was unable to get in communication with him until recently.

X-rays were sent to the witness by technicians in Detroit, and they showed broken bones (637). Examination some two weeks before the witness testified, indicated healing of the angle (638).

Cross-examined (639-643), the witness-physician testified (643) that Davidson, if an average case, would be getting around by the 2nd of December.

On re-direct (644-649) **and re-cross** (649-650) he gave testimony to the effect that if the ankle did not receive proper treatment, as he instructed, 'the foot might continue to be

bad up until the present time, or indefinitely, whereas if the normal relation was restored, . . . them the foot in a reasonable time would function well again' (649). At present it was in good condition, indicating good treatment.

Dr. E. Walter Hall (650-662) testified as an X-ray specialist and answered numerous and lengthy hypothetical questions in relation to the conditions of Davidson's ankle.

Orris Leonard (662-669; 679-682) was a bartender who during October to December 1944 and through January 1945 worked at the Uptown Club, Detroit. He met the Davidsons at the home of his wife's mother, and he saw Davidson, who occupied a room there, every day during that period of time. And he drove Davidson around in his automobile (662-663).

Davidson used crutches about four weeks and thereafter used a cane. When the Davidson couple left Detroit in January 1945, his ankle, from outward appearances, was swollen and bandaged.

IV

Summary of the Argument.

Counsel raise five specific questions involving (1) the scope of cross-examinations, (2) the trial judge's interrogation in chambers, in the absence of the defendants or their counsel, and without their knowledge, of a member of the jury concerning a chance, out-of-court meeting during the progress of the trial between petitioners and the juror, (3) certain instruction to the jury in a supplemental charge, (4) alleged prejudicial remarks of the prosecuting attorney about a separate criminal prosecution, (5) further alleged

prejudicial statements of the prosecuting officer, and (6) petitioner claims that "the cumulative effect of many improprieties by the prosecution and/or trial court resulted in an unfair trial". Therefore, it is argued, the petitioner (in each instance and in the cumulative effect of such errors) was denied due process of law.

Our answer to each question is that in few of such episodes did the petitioner specially set up or claim any right or privilege under the Constitution of the United States (such claims when made were in the most general terms); that the challenged rulings upon evidence, remarks and instructions did not deprive the petitioner of a trial "according to the accepted course of legal proceedings" and that petitioner has failed to show convincingly, essential unfairness in this criminal trial. *Buchalter v. New York*, 319 U.S. 427.

V

The Argument

1

Alleged curtailing of cross-examination.

This question arose (226-227) during the re-cross examination of the people's witness Henry Luks, by counsel for petitioner.

Counsel for Mahoney directed Luks' attention to the fact that he (the witness) had stated the day before that the reason he went (from the train) to Mahoney's place was because it was the nearest place. Counsel then asked the

witness whether that morning he had told counsel for Fleisher-Selik that the reason he went there was because he thought it was the nearest place where he could contact Selik and the rest of the fellows.

"**Mr. Sigler**: Now, if the court please, I submit that is improper. *It is so trivial it is silly*".

Counsel objected to the foregoing italicized remark, and there followed this colloquy (227):

"**The Court**: Of course, you are asking about a very minor detail and a very slight irregularity.

Mr. Bond: I was predicating another question on this particular one.

The Court: What I am getting at, you are dealing with things that are very unimportant to find some deviation that probably is very important.

Q. Very well, your honor. Then I will ask this question. On other occasions you had gone to Detroit from Lansing, previous to that time, you had gone to O'Larry's bar, is that correct?

A. That is right".

There the matter dropped, and counsel did not move the court to strike out the remark or instruct the jury to disregard it.

Moreover, the court, in controlling cross-examination, did not abuse his discretion in sustaining the prosecutor's objection to this unimportant line of inquiry. The deviation in the testimony of this witness was trivial indeed.

There are further answers to the claim that this "curtailment of cross-examination" denied due process of law.

1. At the time the incident occurred, it will be noted (226-227), counsel's objection was directed to the remark of the prosecutor, and he did not contend that the court had unduly restricted his cross-examination, much less did counsel specially claim or set up any constitutional right.

In petitioner's motion (1067) for new trial, such claims were asserted only in a general way, and his 24th assignment of error (reason and ground of appeal) merely quoted (1165) the foregoing excerpt (226-227) from the record.

2. Moreover, this witness had been closely cross-examined by counsel for this petitioner (189-193), as well as by counsel for other defendants (193-199, 200-201, 201-225), and we respectfully submit the trial judge did not abuse his discretion in considering the subject exhausted.

Michigan courts leave the extent of cross-examination to the sound discretion of the trial judge,[16] and the federal courts of that district and circuit adhere to this rule,[17] though with one qualification peculiar to the courts of the United States.[18]

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[16]

People v. Higgins, 127 Mich. 291; People v. Vanderhoof, 234 Mich. 419; People v. Watson, 307 Mich. 596, cert. denied, 323 U.S. 749, rehearing denied, 323 U.S. 815.

[17]

James v. United States, 16 F. 2d 125; Banning v. United States, 130 F. 2d 330, certiorari denied, 317 U.S. 695.

[18]

Limiting scope of cross-examination on matters not involved in direct examination. Banning v. United States, supra; Cajiafas v. United States, 38 F. 2d 8.

We respectfully submit there is no substance to the first question raised by the petitioner.

2

Interrogation of juror.

On the third day of December, 1945, as the case neared its close, the court conducted an investigation in chambers with respect to the conduct of a member of the jury (876-882), the court stenographer being present at all times and reporting the entire interview.

Information had come to the court that one of the parties connected with the lawsuit may have had some contact with the juror; whereupon the juror proceeded somewhat loquaciously to narrate her experience which, when boiled down, amounted to this: One day, while driving into Pontiac, her car stalled, and she motioned to the car in back of her and the driver pushed her; when he came along she said to her companion: 'Oh, I think that is Pete Mahoney'; she thought the state police was in the car, in the back seat (876-877). Mahoney didn't say anything, and the juror didn't get a chance to thank him because he went so fast. Mike Selik and Mahoney were in the front seat. Not one word was said (877). She continued (878):

> "He didn't say anything, he just as he pushed me in, he says: 'Jesus, I hope nobody sees us', that is all he said".

It is apparent from his testimony (878) that she told other members of the jury about the incident.

The court informed the juror there was no state policeman in the car; the defendants were at liberty on bail (880).

He also wanted her to know that no one in the case had anything to do with the inquiry so she would not be wondering who in the case had been 'squealing to the judge', and she replied: 'In my mind, I thought, he has told Kennedy and trying to make something out of it' (881). And the court told her he wanted her to get that out of her mind.

We respectfully submit that such an inquiry, conducted in the presence of the court reporter, was both permissible and harmless. The court would, we think, have been derelict in his duty had he failed to investigate the matter. Nor has it been made to appear that prejudice to the defendant Mahoney resulted therefrom. There is no evidence to show that the juror felt unkindly toward Mahoney because of the incident. Why should she? The man had merely treated her with courtesy, and the court, in conducting his investigation, gave no indication that the conduct of Mahoney was subject to criticism.

Nor was this question raised in its federal constitutional aspect.[19] The petitioner's counsel in the court below averred (1071) in his 25th ground for new trial (motion, 1067-1073) "That the court erred in privately questioning two jurywomen relative to" the foregoing incident, and in his 22nd reason and ground for appeal (1165), he predicated error "because the defendants and appellants were prejudiced by the action of the court in interrogating a

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[19]

Although petitioner stated (1160) as his first assignment of error in the most general terms that the defendants had been denied their constitutional rights, he did not contend in his specific assignment on this particular point, that such a right or privilege was specially set up or claimed, 28 U.S.C., Revised, § 1257.

member of the jury etc.", but he did not claim that a constitutional right guaranteed by the Fourteenth Amendment had thereby been abrogated or infringed.

3

Supplemental charge to jury.

After the jury had deliberated for approximately 27 hours, and after hearing certain testimony read to them at their request, they were instructed as follows:

> "**The Court**: We have done the most we can to assist you in regard to your statement. If there are any others you should find necessary, you may request them the same as you have in this instance.
>
> "I think, however, in order that you may give each other respectful consideration, not implying you have not done so already, but I think I should give you at least a further instruction that may have some bearing on situations of this kind, which I have given on other occasions where jurors have difficulty in reconciling their differences as to testimony and I shall do so at this time.
>
> "The Court instructs the jury that the only mode provided by our Constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in

order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with with candor and with a proper regard and deference to the opinions of each other. You should consider that the case should at some time be decided; that you are selected in the same manner, and from the same sources, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this in view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the people to establish every part of it, beyond a reasonable doubt, and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust

the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"Now, I ask you to remember the elements of the case as presented. Go over the testimony as may pertain to the various respondents in this case and try conscientiously and honestly in your own convictions and arrive at a verdict if you can conscientiously do so. You may retire".

Shortly thereafter, the jury returned their verdict (55, 1060) finding all the defendants guilty.

Petitioner claims that this instruction was coercive.

We contend that it was not.

We believe the general rule was well stated in 38 Cyc, page 1762.

"The Court may impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefor and tell them it is their duty to try to agree; but should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion."

It is quite evident that the court has no right to tell the jury that it is their sworn duty to agree upon a verdict or that they must agree upon a verdict.

The court must not tell an individual juror to give up his own view and agree with the majority.

On the other hand, it is improper to instruct the juror that he should hold to his own view against the others and not listen to the opinions and arguments of other members of the jury with an open mind. It is the duty of the individual jurors to discuss the evidence and give their views as to the same and to deliberate upon such matters before arriving at a decision. (See *People v. Good,* 99 Mich. 620)

In *People v. DeMeaux,* 194 Mich. 18, after the jury had deliberated for a period of time and had been unable to arrive at a verdict, the court told them.

"It is your sworn duty to arrive at a verdict."

The Michigan court very properly reversed the conviction in that case because the instructions to the jury gave them a wrong view of the law and were definitely coercive. If the jury must, at all odds, render a verdict and some of the members could not conscientiously agree to the result, it would not be a unanimous verdict of all the jurors.

The court below, after stating the question presented as follows "in the briefs on this appeal", 322 Mich. 488, followed the opinion of the Court in *People v. Chivas,* 322 Mich. 384, decided the same day in a connected case based upon the same record though in a separate appeal. In *Chivas, supra,* 322 Mich. at 395, the Court, speaking of the supplemental charge to the jury, well said:

> "In our opinion the court did not tell the jury that it was their duty to agree upon a verdict or tell an individual juror that he must give up his own views and agree with the majority. The jury was instructed to deliberate upon the matters in issue with an open mind, giving due credit to the opinions of others. The jurors were also instructed that the verdict must be

the individual verdict of each juror and be the result of his own convictions. We are unable to find any coercion in the instructions given".

We cannot agree with counsel that consideration can properly be given to the affidavit of Juror Grogan (1085-1087), for, upon reading them, the cases cited do not support such a contention. It cannot be said that the affidavit in question was testimony "in denial or explanation of acts or declarations outside the jury room" or that it related "external causes tending to disturb the exercise of deliberate and unbiased judgment",[20] nor can it be said that the Grogan affidavit bore "upon the existence of an *extraneous* influence (the unsolicited, supplemental charge in question) that may have affected this jury's verdict" (petitioner's brief, p. 30).

4

Alleged improper remarks.

In relating this incident, counsel depart from the record somewhat, especially in his reference to the case of Hooper and the manner in which it was drawn into the record.

The State's witness Abramowitz was under severe cross-examination (484-486) by counsel for Fleisher-Selik, who

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[20]

Mattox v. United States, 146 U.S. 140, holding that in determining what may or may not be established by the testimony of jurors to set aside a verdict, public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow it; but evidence of an overt act, open to the knowledge of all the jurors, may be so received. See also Hyde v. United States, 225 U.S. 347, holding, last headnote, that "where the jury render a verdict within the issues, testimony of jurors themselves should not be received to show matters which essentially inhere in the verdict and necessarily can receive no corroboration". Such is the situation here.

endeavored to the best of his ability to bring the Hooper murder-conspiracy case before the jury. He had asked the witness whether after the 27th day of March 1945, when he was arrested, the witness was told by police officers that a picture of himself had been picked out by a Mrs. Iris Brown, the manager of a tavern in Albion, Michigan, and identified as looking like the man who was in her bar-room in Albion on the 11th day of January. The witness did not recall it, and counsel asked him: 'You certainly would remember that'? (485).

This remark of defense counsel was objected to by the prosecutor and a heated argument ensued during the course of which the prosecutor stated (486):

> "As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar".

Counsel for Mahoney claimed this to have been fatal, and he contended that the court erred in denying his motion for a mistrial (527), urging that the remark of the prosecutor implied that Mahoney had been identified as the possible murderer of Senator Hooper.

1. We do not think the remark justified such an inference, or that the prosecutor intended so to imply. The court had consistently refused to allow either side to delve into the Hooper case, and we submit there was nothing in the remark itself that could lead anyone to believe that Mahoney had had the remotest connection with the Hooper murder.

2. The court at once, even before counsel could interpose his objection, instrued the jury to disregard the remark, and he ordered it stricken from the record (486); counsel for Mahoney seemed satisfied with such a ruling, and the conflict between counsel shifted to argument be-

tween Fleisher's attorney and the prosecutor (487). It was not until some time later (527) that Mahoney's counsel made his motion for mistrial.

We cannot accept counsel's claim that this was a denial of due process, and we respectfully submit that the inference which he draws, brief, pp. 37-41, are based largely on speculation.

As this Court have said:[21]

> ". . . 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' ".

5

Claim that prosecutor "testified" when making certain remarks.

It appears from the opinion of the court below, 322 Mich. at 483, 34 N.W. 2d at 19, headnote 6-8, that the appellants urged three points relating to one Hyman Niskar and one Eisner: (1) that the prosecution should have endorsed the name of Niskar on the information as a *res gestae* witness, (2) that the court erred in denying motions for continuance until Niskar should be produced as such a witness, and (3) that the court abused discretion in denying motions to strike and for a mistrial because of alleged

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[21] Adams v. McCann, 317 U.S. 269, 281, quoted with approval, Buchalter v. New York, 319 U.S. 427, 431.

improper statements made by the proescutor relating to the witness Eisner.

The incident upon which the present claim of denial of due process rests, centers upon the latter phase of the question, and upon the prosecutor's remarks:

> "... prior to that day Mr. Eisner made certain claims about his automobile" (917); and again: "Prior to that date Mr. Martin Eisner claimed one thing—" (918).

Without going into details, reference to the record (917-919) will disclose, we respectfully submit, that the incident occurred during the prosecutor's re-direct examination (917-925) of the witness Lyle Morse. The question which started the argument (917) was this:

> "Q. ... I will ask you whether or not prior to the day you met Martin Eisner out here in the corridor on the occasion he talked to me, if prior to that time he had loaned his automobile to one of these defendants?"

There at once arose a heated discussion between counsel over the objections raised to this question (917-919), none of which need be repeated here. The question was never answered. The court expressed the opinion (920) that if the jury didn't get the alleged prejudicial effect of the question any better than he did, 'because in the confusion I didn't know what was transpiring'. Further:

> "**The Court**: In the matter you are just speaking of, I think you are attaching undue importance. I was listening to the question for the purpose of ascertaining the subject matter under consideration, and that

was when the name of Niskar was learned or when his being was first known to officers . . . or to the prosecution. That is what I was listening for, and probably because I was listening for that, I didn't hear some of the things you and Mr. Sigler said back and forth, but I am sure if the jury didn't hear more about it than I did, there would be no prejudice".

We agree with the trial court that counsel were making a mountain out of a mole hill.

And, we respectfully submit, it is still a mole hill.

6

Cumulative effect of specific instances of alleged impropriety.

Since counsel does not argue his sixth question, but merely states his position, brief, p. 48, we also refrain, contenting ourselves with reference to the penultimate paragraph of the opinion of the court below, 322 Mich. at 489-490, 34 N.W. 2d at 22, headnote 17, and more esp., the following:

"Impaneling of the jury in this case began October 23, 1945, and with some intermissions the trial continued and was concluded December 7th. The condensed record on appeal contains nearly 1200 pages. It is quite impossible in lengthy and vigorously contested trials of this character to attain absolute perfection. Mere irregularities which occur at various intervals during such trials do not justify reversal . . . In the instant case we hold appellants were not deprived of their constitutional rights of a fair trial and that the record abundantly supports their position".

VI

Conclusion

We, therefore, respectfully submit, on the several grounds asserted in this brief, that the petition for writ of certiorari to the Supreme Court of the State of Michigan should be denied.

Respectfully Submitted,

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